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February 4, 2020

*Via Email and First-Class Mail*

William W. Beach, Commissioner  
United States Bureau of Labor Statistics  
2 Massachusetts Avenue, NE  
Washington, DC 20212-0001

Re: Changes to Department of Labor Media Lockup Effective March 1, 2020

Dear Commissioner Beach:

On behalf of Associated Press, Bloomberg L.P., Dow Jones & Company, Market News, and Reuters, we write to address the recently proposed changes to the Department of Labor (DOL) Lockup (“Lockup”) procedures (effective on March 1, 2020), which would bar the use of electronic equipment by Lockup attendees to prepare their news reports.

Expressly – and seemingly exclusively – relying on a single, outdated Inspector General (OIG) report, the proposed changes would take away modern and now well-entrenched tools of reporting. The DOL suggests the changes are necessary because “accurate news reports must be weighed against the inequitable trading advantage that a Lockup can potentially create.”<sup>1</sup> In fact, if the DOL were to move forward with these rule changes, history suggests that decision is very likely to have the opposite of the intended effect and have a material negative effect on the public in the form of less timely reporting and analysis. It could materially increase the risk of market disruption through misinformation and would favor those in the market who would rather not see information disseminated as fast as possible to the largest number of interested consumers. Had the DOL engaged in the public notice-and-comment process mandated by the Administrative Procedure Act, it would have become clear that the proposed

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<sup>1</sup> Bureau of Labor Statistics Information letter to Bureau Chiefs, “Changes to Department of Labor Media Lockup Effective March 1, 2020,” (Jan. 16, 2020), *quoting* Office of Inspector General report 17-14-001-03-315, dated July 14, 2014.

Lockup changes are ill-conceived and would be counterproductive. They are arbitrary and capricious, and inconsistent with well-established First Amendment principles. We, therefore, request that the proposed changes not be implemented on March 1, 2020 and that the current rules governing the DOL Lockup be reinstated.

### **Executive Summary**

On January 16, 2020 – without prior notice or consultation – the DOL announced that, effective March 1, 2020, it would fundamentally and radically alter the traditional media lockup historically used to facilitate the accurate, reliable, and simultaneous dissemination of critical market moving information.

It is not clear how the DOL's proposed changes would address the agency's stated goals. It is clear to our clients that the proposed changes are dramatically over-broad, would diminish accuracy in reporting, are inconsistent with the First Amendment, and would create significant new cybersecurity risks – a particular problem in light of the DOL's historic and ongoing serious cybersecurity shortcomings.

The Administrative Procedure Act (APA) provides that policy changes of this magnitude be subject to notice and comment. This process would enhance the prospects of clearly defining DOL goals and targeting potential remedies that addressed issues without creating unintentional problems. Adherence with the APA isn't merely prudent, it is legally required. As discussed below, we look forward to joining a process with the DOL that identifies and addresses issues while minimizing severe unintended consequences.

The world has evolved rapidly since 2014, and nowhere has that evolution been faster than on the Internet. As multiple U.S. intelligence agencies have shown, the capacity and motivation of malevolent foreign actors to manipulate and interfere with our electronic information infrastructure has never been higher. The proposed rules would create a single point of failure and vulnerability that the DOL, according to its own and third-party assessments, is not prepared to protect.

While we are confident that the proposed rules would be set aside if challenged in court, none of our clients wants to have to resort to litigation. Rather, we would hope that upon consideration of the points set out below, the DOL will recognize that its goals would be better achieved through a constructive process that would take into account the perspectives of all interested parties.

### **Lockups Serve to Promote Accurate Reporting of Key Economic Data**

Members of the public (as well as many professional traders) rely on news outlets' dissemination and analysis of the raw data released by government agencies in order to make decisions about their own investment strategies and to more fully understand the state of the American economy and workforce. That is why the news and

analysis reported by the Lockup attendees is widely published to an audience that includes professionals in the markets, investment fund managers, economists, pension fund managers, as well as individual, non-professional investors and interested members of the general public.

The reality is that the key economic data reported by the Lockup attendees is published broadly – and includes significant analysis from multiple independent sources. In this way, we believe the analysis of the raw data provided by the attendees to this wide audience effectively levels the playing field for individual traders vis-à-vis algorithmic traders far more than the proposed policy change ever could. Accordingly, our clients posit that the target (algorithmic traders) of the “fix” is misidentified and the “fix” itself (handicapping the ability to publish post-Lockup) is overbroad. Dissemination through a single Internet site clearly favors the few who have the financial resources both to invest in advanced web-scraping technology and the hardware required to trade on the information before it is available to the investing public.

A bit of history may prove helpful. The first DOL Lockups occurred in the 1980’s and were designed as a means to allow news agencies to ask questions and meaningfully analyze economic data before an official release to ensure that the initial reporting is accurate. The institutionalization of Lockups was spurred in 2000 with the enactment of the “Information Quality Act,” which directed OMB to issue Government-wide information quality guidelines to ensure the “utility...of information collected for statistical purposes.” 44 U.S.C. § 3504 (e). Consistent with this statutory directive, OMB has acknowledged that “Our Nation relies on the flow of objective, credible statistics to support the decisions of governments, businesses, households and other organizations,” and that a loss of trust in the integrity of the statistical system could “decrease the quality of statistical system products,” and “foster uncertainty about the validity of measures our nation uses to monitor and assess its performance and progress.” OMB Policy Directive 4: Release and Dissemination of Statistical Products Produced by Federal Agencies, 73 FR 12622 (March 7, 2008).

Along with stressing the importance of enhancing the utility of information and the accuracy of initial reporting, OMB Policy Directive 4 stresses the importance of the *simultaneous* release of data to all interested parties. As a result, the elements of an effective dissemination program include a variety of avenues for data dissemination, chosen to reach as broad a public as reasonably possible. Theoretically, this means that the DOL publishes the economic data on its website at precisely the same time the Lockup embargo is lifted.

In aid of this goal, news organizations presently are pre-screened and approved to participate in the Lockup. Participating organizations arrive at the DOL on the morning of the Lockup and surrender their mobile communications devices (tablets, phones, etc.), which are locked in lockers outside of the room. Participants themselves are then locked in the room without the capacity to communicate to the outside world, and receive embargoed data a half hour or an hour before its official release. They are only able to

utilize their own software to produce news stories that include historical context and analysis to accompany the release of the numbers. Although the computers used by Lockup participants are owned by each participant, the computers are required to be mass-produced, delivered directly to the DOL upon purchase, and loaded with software approved by the DOL. When the Lockup period ends, the DOL flips a switch permitting the simultaneous transmission of the news reports via participants' own dedicated lines. The release is simultaneous with release via the DOL's website, secure, and accompanied by news stories with context to enhance usefulness and accuracy.

For these reasons, media organizations that routinely report on financial data, including those submitting this letter, have agreed to the terms of the Lockup agreement, with certain temporal restrictions placed on publication during the Lockup period. Under this agreement, then, they are provided with advance access to the economic data. And early release of the data, by Lockup participants, has not historically been a problem.

Currently, the DOL Lockup agreement does not regulate publication of the data after that data has been released to the general public – nor could it constitutionally do so. But that would change with the new policy announced by the DOL.

### **The Proposed Changes Would Slow the Transfer of Data**

The proposed changes do not address concerns surrounding an *early* release of data. Rather, the changes would slow down *post-release* publication and use of the data by the attending news organizations.

The proposed changes that would take effect on March 1, 2020, are based upon a single report by the OIG, published in 2014. Historically, the government promoted the use of the Lockups as a way to help level the playing field among market participants. Without citing newer authorities than the six-year-old report, the DOL now says the opposite: that the Lockup creates unfair advantages to some of the attendees' clients who engage in algorithmic trading because the attendees can format the data for computer transmission directly to the algorithmic traders once the Lockup period ends. Those algorithmic traders would then act upon the data immediately upon receipt, supposedly to the detriment of the broader investing public.

The DOL's January 16, 2020 letter to Bureau Chiefs quotes from the 2014 OIG report:

Several news organizations that participate in the Department of Labor press lock-up are able to profit from their presence in the lock-up by selling, to traders, high speed data feeds of economic data formatted for computerized algorithmic trading.

Thus, the DOL's reasoning now goes, taking away the attendees' computers would "level the playing field" between algorithmic traders and others by not allowing

attendees to pre-format the data or accompanying reports. But what this really means is that the proposed change targets both the *speed of publication* after release and the *number of people* who can instantly receive it. The reasoning behind this approach relies on a badly out-of-date study that necessarily fails to take account of current Internet technology and infrastructure.<sup>2</sup>

As noted in the DOL's January 16 letter, "developments in high-speed algorithmic trading technology now give a notable competitive advantage to market participants who have even a few microseconds head start." Indeed, in 1 millisecond, or 1/1000 of a second, supercomputers can obtain information from a website, synthesize the information relative to the programmed instructions, and send an order back out to the market. For example, on December 6, 2019, the 10-year treasury contract saw 3,000 trades in the first second after the release of the jobs report. If one were to normalize this one-second relative to 25 years ago, a one-second disparity today between the webpage and Lockup information release (a routine occurrence) is equivalent to a staggering two-hour difference.

Although the announced intent of taking away computers from the Lockups is that the raw data would be released simultaneously to the participating media and the general public (ostensibly through the DOL website), due to the speed of modern-day supercomputers the reality is that the raw data will be scraped from the DOL's website and, thus, the changes will have little, if any, effect on the perceived advantage to algorithmic traders. Instead, it will increase the advantage that algorithmic traders have by impeding Lockup attendees' ability to disseminate their analyses of the data.

For example, the scraping of data will happen in microseconds – much faster than a person can read, digest, and then trade upon the same data from the DOL website. If the DOL's characterization of the change were reality, in order to publish their analyses of the raw data, reporters would have to leave the room and walk to the lockers containing their mobile device, walk to an area that has reception to transmit, type or record a report on the data, and transmit that report to their news organizations to be published.

It is self-evident that the time needed to complete these tasks would be significantly longer than microseconds. It would certainly be longer than the milliseconds it would take an algorithmic trader to scrape the data from the DOL server and execute programmed trades. The proposed change, therefore, will delay publication of analysis without any real effect on those who trade entirely based upon data points and have no need for the written analysis, and consequently would not be effective at solving the problem it is supposed to address. To the contrary, the proposed changes would exacerbate the disparity between algorithmic traders and everyone else.

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<sup>2</sup> It is also worth noting that much algorithmic trading order flow *is* retail order flow; thus when a high speed trader profits, some of that benefit is going to retail investors.

**The Proposed Changes to the Lockup Agreement Would Damage  
Access, Accuracy, and Security**

In addition to failing to level the playing field, the proposed changes would decrease the accuracy of reporting data, decrease access to analysis on the part of the very people these changes are intended to help, and increase national economic and security risks.

**Accuracy:** Perhaps the most obvious risk is that the lack of computers in the Lockup would lead to reporters racing to produce reports as quickly as possible after the embargo is lifted. This inevitably increases the potential for mistakes and inaccuracies. Pens and pads do not solve the problem, as the reports would need to be converted to digital form. Calling in stories via phone is a relic of the past and susceptible to transcription error. Without access to statistical interpretation tools that automate, validate, and fact-check the new data, errors would surely increase and the news itself would become less comprehensive. The main losers from this decline in quality would be members of the public who read the reports and rely upon the analyses. Algorithmic traders, conversely, only use the data and have no need for the analysis.

**Access:** As noted above, the proposed changes seem to contemplate that delaying the news organizations' preparation, and release of their reporting would make the timing of their reporting coincide with the use of the data from those who download it directly from the DOL's website. But the reality is that when market-moving news is released first on the Internet, it disproportionately enriches those elite few who can afford expensive web scraping technology and real estate as close to the DOL's servers as they can get, in order to increase the speed by which they can scrape the data from the DOL's website. Moreover, given the profits to be made from getting first access to the data, those with the resources and capability have a huge incentive to bombard the websites with requests. In practice, this may even cause the websites in question to be inaccessible to the public at precisely the time of the release, potentially creating a period of seconds to minutes where sophisticated traders have access to critical information that the investing public does not. This is another way in which algorithmic traders are likely to benefit from the policy changes relative to everyone else.

**Security:** Although the DOL's January 16 letter mentions security concerns, the proposed changes do nothing to safeguard against the *early* release of data. Nonetheless, there are other security concerns of an equal or greater magnitude than an early release. The media organizations reporting on financial news have spent enormous sums installing highly secure, dedicated lines in the Lockup room – lines that entirely avoid the Internet and its inherent vulnerabilities to transmit the data once the reporting embargo is lifted. In the world in which we live, for the DOL to affirmatively force the transmission of critical data away from the existing, secure, dedicated lines and instead steer people to the vulnerable, open, unsecured Internet, is, with all due respect, irresponsible. We simply live in a different world than the OIG study even contemplated. There are multiple foreign actors, both state and non-state, who are actively seeking to injure the

United States, lessen public confidence in government information, and sow confusion in financial markets. The proposed changes thus put a heavy burden on the DOL to safeguard the single channel of communication it intends to create.

We are further concerned that the DOL lacks the technology expertise to meet this burden, as is suggested by the DOL's own Office of Inspector General, Office of Audit in the November 14, 2019 report, "Stronger Controls Needed Over Web Application Security" issued to the DOL Office of the Chief Information Officer. The OIG found, and the DOL's CIO office generally concurred, that: "[The] DOL will not be able to ensure availability, integrity, and confidentiality of public-facing web applications without establishing and implementing appropriate security controls. Compromised websites serve as an entry point for intrusions into other internal networks and failure to implement adequate security for these web applications can lead to a compromise of sensitive data and the unavailability of [the] DOL's critical applications." (p. 2). The remediation of the OIG's findings are not trivial. Indeed, the findings in the OIG report show that the security of all of the DOL's Web Applications are in a state of disarray. This has been a repeated complaint by the OIG since 2008, not just in the November 2019 report. The November report notes that the Plans of Action and Milestones (POA&M) were established to mitigate web application vulnerabilities "in the primary environment for publishing of DOL internet" (and intranet) services, but the DOL has not completed remediation efforts in a timely manner. Of the 68 established POA&Ms, 16 labeled as "high critically" were still uncorrected after three years. Of the 68 total recommendations, 34 are currently delayed, 12 were cancelled and only 22 were completed (p. 5-6).

KPMG concurred with many of the OIG's observations in the December 23, 2019, FY 2019 Federal Information Security Modernization Act ("FISMA") DOL information security report, "Implementation of Security Tools Hindered by Insufficient Planning." In this assessment, KPMG found 6 of the 8 FISMA metric domains insufficient including: annual assessment of third party cloud services not performed; unimplemented tools for monitoring software and hardware on the network, weaknesses of varying risk levels not mitigated; software (security) patches not implemented; configuration reviews not performed; audit logs not reviewed; reportable incidents were not reported timely to US-CERT and contingency failover tests not performed.

The reports note that the DOL simply has not made it a priority to address areas of weaknesses and bluntly concludes, "Based on these issues, we remain concerned about the uneven oversight and accountability of the IT control environment" (p. iii). Fundamentally, the policy changes at issue today effectively raise the cyber-risk profile of bls.gov and compromises all three crucial components of effective cyber security (confidentiality, integrity and availability) of the DOL economic releases by creating a risk of a single-point-of-failure in an already weak security environment.<sup>3</sup>

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<sup>3</sup> Consider that an attacker (nation-state, lone wolf, gray-hat, black-hat, etc.) anywhere in the world can cause traffic floods on the DOL network that would prevent any data from entering or exiting for the duration of the attack. This type of attack (referred to as a "distributed denial-of-service" or "DDoS")

Media companies have made substantial investments in their existing, secure, and dedicated lines largely to avoid the security risks that the DOL would be introducing. Indeed, even without sabotage, websites of government agencies regularly crash during the release of market moving numbers. These crashes have generally been an inconvenience, not a catastrophe, precisely because multiple news organizations, utilizing their own dedicated lines, were able to deliver the highly sensitive data to the market instantaneously. If the DOL's new regulatory regime goes into effect, the next comparable crash may have far-reaching consequences. Internet distribution can be "gamed" in ways that are simply not possible over redundant, dedicated lines.

### **Market Effects from Disparate Timing of Market Data Releases**

When considering the proliferation of algorithmic trading around economic events from a variety of market participants, temporal uniformity should be a primary goal of government agencies, rather than hindering news organizations' ability to report after the Lockups. Havoc can result when temporal uniformity is absent, as recently seen in the wake of the U.S. Department of Agriculture's (USDA) elimination of its Lockup in 2018. Specifically, in conjunction with the release of two critical grain reports, on June

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attack) happens routinely and is typically executed from thousands of infected machines spread across the world, thus making it a long and labor-intensive process to mitigate the attack and return normal service to the affected network. However, if the DOL is considering employing a cloud-based release strategy that geographically balances the delivery load, it will not be able to assure that all of the distribution channels will release at the "same time." In the end, the Lockup policy changes would increase the cyber-risk profile and exacerbate the very conditions that the DOL finds unfair and seeks to alleviate, without any corresponding benefit(s).

Other types of attacks are possible. Domain Name Server ("DNS") spoofing is also a likely risk: A cybercriminal could create a convincing and identical copy of a real government financial data webpage, host it with false information on their own hardware, and then have the URL route viewers to the false version of the page. There are many DNS servers in the global Internet. Depending on which are compromised, certain geographical areas of the world could see the real website and others could see the fake site. Even if the confusion only lasts for a few seconds, automated-trading algorithms could place billions of dollars in trades on the strategically placed false data, possibly triggering major systemic stability concerns.

Also quite possible is Border Gateway Protocol (BGP) hijacking, which refers to the gateways that are used to route traffic over the Internet. BGP hijacking occurs when attackers maliciously reroute internet traffic by announcing false ownership of ranges of IP addresses, claiming to own, control or route to devices that they do not own. Once attackers compromise a BGP-enabled router that bridges one part of the internet to another, they can easily start rerouting traffic to create what is called a "man in the middle" attack. This allows them to monitor or change data by standing in the middle of a connection where two parties believe they are talking directly to each other. In the case of financial releases, they can potentially obtain the release ahead of other market participants. Worse yet, criminals can use the real release to their advantage and spoof the release to provide other market participants fake information. There have been some recent high-profile cases where cybercriminals utilized BGP hijacking. In June 2019, a notable portion of European mobile traffic was routed through China Telecom, and in May 2019, traffic to a public DNS run by Taiwan was rerouted to an entity in Brazil.

28 and November 8, 2019, the official USDA web page experienced a 90-second and six-minute period of inaccessibility, respectively. During these two instances, prices rose dramatically, nervous investors faced significant uncertainty, and the futures' price action of each commodity contained in the release did not start reacting at the same time. The deluge of traffic crippled the website and created the opportunity for those few who acquired the data to achieve tremendous profits.<sup>4</sup>

Since the proposed changes would delay the attendees' publication by a significant amount of time while others would be able to access the Internet data in milliseconds, the changes present a very real danger of bad actors attacking or manipulating the DOL's release of data via the internet. Well-funded foreign actors with sinister motivations, whose objective is not principally to seek profit but to disrupt the smooth functioning of the U.S. economy, could also intentionally exploit the same vulnerabilities to deny access to U.S. government data if they so choose. At the limit, the proposed Lockup changes might not only favor algorithmic traders relative to the broader market, but also could potentially damage confidence in the U.S. financial markets.

### **The Proposed Changes to the Lockup Agreement Violate the APA**

The anticipated changes do not pass muster under the APA. The DOL may take the view that the Lockup changes address internal agency procedural rules which are exempt from the notice-and-comment requirements of 5 U.S.C. § 553. We respectfully disagree. Courts have defined agency procedural rules as the "technical regulation of the form of agency action and proceedings ... which merely prescribes order and formality in the transaction of ... business." Pickus v. United States Bd. of Parole, 507 F.2d 1107, 1113-14 (D.C. Cir. 1974). The exception does not include any action that "substantially affects the rights of those over whom the agency exercises authority." Pickus, 507 F.2d at 1113-14. Because the proposed Lockup changes would have a substantive impact upon the attendees' ability to publish in the post-embargo period, the DOL must promulgate the rule changes through notice-and-comment rulemaking. Moreover, the potential impacts described above, resulting from substantive changes the DOL is making to its cyber-risk profile and in light of the recent OIG and KPMG FISMA 2019 reports, demand that the DOL obtain an independent risk-assessment of its plans and provide the public with more transparency and the opportunity to comment. With the potential impact to the integrity of the financial markets at stake, an independent assessment based on these critical cyber-security critiques alone argues for Commissioner intervention to delay the March 1, 2020 implementation date and conduct a public review.

But even if a notice and comment period were not required, the Lockup changes would not survive review even under an arbitrary and capricious standard.

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<sup>4</sup> See, e.g. Christopher Walljasper, "A 10-minute delay of key USDA reports gave some people an advantage. Here's why." Midwest Center for Investigative Reporting (Nov. 19, 2019), available at <https://investigatamidwest.org/2019/11/19/a-10-minute-delay-of-key-usda-reports-gave-some-people-an-advantage-heres-why/>.

To do so, the DOL would have to demonstrate that it engaged in reasoned decision-making by providing an adequate explanation for the changes. Motor Vehicle Manufacturers Association v. State Farm Auto Mutual Insurance Co., 463 U.S. 29, 42-44 (1983) (“[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”); Encino Motorcars, LLC v. Navarro, 136 S.Ct. 2117 (2016). That means that the DOL must be able to provide the “essential facts upon which the [changes in the Lockup] was based” and explain what justifies the determination with actual evidence beyond a “conclusory statement.” United States v. Dierckman, 201 F.3d 915, 926 (7th Cir. 2000); Allied-Signal, Inc. v. Nuclear Reg. Comm’n, 988 F.2d 146, 152 (D.C. Cir. 1993); Prometheus Radio Project v. F.C.C., 652 F.3d 431, 469-71 (3d Cir. 2011) (finding FCC rule was arbitrary and capricious because the agency “offered no data attempting to show a connection between the definition chosen and the goal of the measures adopted”); Islander E. Pipeline Co., LLC v. Connecticut Dep’t of Env’tl. Prot., 482 F.3d 79, 103 (2d Cir. 2006) (finding agency decision arbitrary and capricious where “the agency cited no data or studies to support [its] conclusion”). An agency decision that is the product of “illogical” or inconsistent reasoning; that fails to consider an important factor relevant to its action, such as the policy effects of its decision or vital aspects of the problem in the issue before it; or that fails to consider less restrictive, yet easily administered regulatory alternatives, would also fail the arbitrary and capricious test. We respectfully submit that the DOL has not provided such reasoning, and, we believe, ultimately could not do so.

**The Proposed Changes to the Lockup Agreement Do Not Comport  
With First Amendment Protections for the Press**

Targeting the use of the released information, by certain media clients, after the Lockup is not a legitimate area for government regulation. Quite to the contrary, government regulation of the *publication* of news is flatly rejected by the plain language of the First Amendment. Yet, by targeting post-release publication of data to the news agencies’ clients, the proposed policy changes violate established First Amendment principles in two key ways.

First, regulations designed to curtail or hinder only certain speech are considered content-based regulations of speech subject to strict scrutiny. The DOL’s announcement concedes on its face that it is designed to slow down the attendees’ release of information to certain audiences, and thus is a content-based restriction. As it is not narrowly tailored to meet a compelling state interest (to the extent one has even been articulated, which we respectfully submit is not the case), it is an unconstitutional restriction.

Furthermore, by taking away the modern tools of the media’s trade and thus *purposefully hindering* the media’s publication, the proposed changes effectively act as a prior restraint over information already in the possession of the media. A prior restraint is an order or regulation that restricts or prohibits someone from publishing information already in its possession. Nebraska Press Ass’n v. Stuart, 427 U.S. 539, 556 (1976). Prior restraints on the press are extremely disfavored and virtually never upheld. See Nebraska

Press Ass’n v. Stuart, 427 U.S. 539, 558 (1976); New York Times Co. v. United States, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971).

As the United States Supreme Court declared more than forty years ago: “As a practical matter . . . the element of time is not unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly.” Nebraska Press Ass’n v. Stuart, 427 U.S. at 559. “A prior restraint, . . . by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication ‘chills’ speech, prior restraint ‘freezes’ it at least for the time.” Id. at 559. The fact that the restraint is temporary does not save it from constitutional scrutiny. See New York Times Co., 403 U.S. at 715 (Black, J., concurring) (“[E]very moment’s continuance of [the order below] amounts to a flagrant, indefensible, and continuing violation of the First Amendment.”).

Since, by its own admission, the DOL’s proposed changes are designed to hinder, and thus delay, the attendees’ ability to publish the data after the Lockup period ends, the DOL must overcome the heavy presumption against its constitutional validity by demonstrating that the substantive evil from publication must be extremely serious and the degree of imminence extremely high. That is, the DOL would have to demonstrate to a court that the speech at issue would constitute an immediate, and not merely possible or likely, threat. The DOL, in proposing these Lockup changes, again cannot meet that test. Instead, the proposed Lockup changes appear to have been based on mere speculation, with no cited factual basis to support a conclusion that metaphorically tying one hand behind a reporter’s back is an effective tool to combat the perceived evil of algorithmic trading. We would note, in particular, that the DOL fails to craft an acceptable narrowly tailored remedy when it seeks to ban the use of computers used to produce stories that are read by human eyes in order to address alleged problems relating to algorithmic trading on raw data.

### **The Lessons of 2012**

In 2012, the DOL attempted to unilaterally and fundamentally change the terms of the Lockup by requiring news organizations to use DOL-owned computers, announcing without meaningful consultation or explanation a deadline for removal of equipment used by media companies. The DOL’s proposal threatened the First Amendment, threatened to reduce the accuracy of reporting, would have increased market volatility and vulnerability, and posed a significant cyber-security risk. The problem at core was the DOL’s failure to follow the APA. Under required public notice-and-comment, the DOL’s concerns could have been more clearly defined and hopefully addressed with the least risk to other critical and protected values.

Under the leadership of Senator Roy Blunt, then House Oversight Committee Chairman Darrell Issa and many others, Congress encouraged the DOL to withdraw its proposal and enter into discussions with the media. The 2012 proposal was withdrawn, constructive discussions to clarify the DOL’s concerns occurred and a carefully crafted

means of addressing those concerns was devised and implemented. We would hope that could be the model here.

**Conclusion**


It is clear that the reasons articulated for implementing the changes do not hold up to scrutiny, factual or legal. Deliberately delaying the news organizations' ability to publish is not an effective way to address a perceived issue with traders who use the DOL's data for their algorithmic trading. Indeed, the traders who rely upon algorithms for their trades do not create an algorithm after receipt and analysis of economic data. Rather, algorithmic traders study the markets and create algorithms ahead of time. At the time the DOL releases the data, the only thing left is to input it into a computer and run the algorithm. Therefore, they will always be able to act upon data faster than others. It is those constituents who require more detailed reporting and analysis that are harmed by this proposal.

Lockup procedures designed to hinder publication of the data by attendees would do nothing to change that fact, but they would likely lead to greater time disparities that ultimately favor the algorithmic traders, as well as create unnecessary – and potentially devastating – security risks. Thus, the proposed changes, at a minimum, would be ineffectual at achieving the DOL's stated goals and would result in an unconstitutional limitation on the media's First Amendment protected right to newsgathering and dissemination.

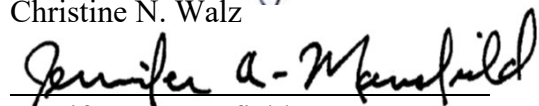
For the above reasons our clients have substantial concerns about the newly announced changes to the Lockup procedure that would prohibit the use of any electronic devices by attendees to prepare their reporting. We hope the above analysis is helpful to the DOL and that the proposed changes, as well as the process through which they are being implemented, will be re-considered in light of the facts and legal authority cited. Specifically, we request that the proposed changes not be implemented on March 1, 2020 and that the current rules governing the DOL Lockup be reinstated. We welcome the opportunity to meet with the DOL to further discuss this important matter.

Very truly yours,

HOLLAND & KNIGHT LLP



Christine N. Walz



Jennifer A. Mansfield

cc: The Honorable Eugene Scalia (executivesecretariat@dol.gov)  
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