TESTIMONY OF DANIEL MOSS, EXECUTIVE EDITOR, ECONOMY AND INTERNATIONAL GOVERNMENT

BLOOMBERG NEWS

BEFORE THE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

OF THE U.S. HOUSE OF REPRESENATATIVES

REGARDING THE DEPARTMENT OF LABOR'S PROPOSED POLICIES ON

THE DISSEMINATION OF ECONOMIC DATA TO THE PUBLIC

JUNE 6, 2012

INTRODUCTION. Chairman Issa, Congressman Cummings and Members of the Committee. My name is Daniel Moss. I am the Executive Editor for Economy and International Government at Bloomberg News. I thank the Committee for the opportunity to appear today, and I want to express my particular appreciation to the Committee for its engagement on this issue. As part of Bloomberg LP, Bloomberg News – like Bloomberg Law, Bloomberg Government, Bloomberg New Energy Finance and Bloomberg BNA – provides data, news and analytics to decision makers in industries beyond finance. Bloomberg News is delivered through the Bloomberg Professional service, television, radio, mobile, the Internet, two magazines, Bloomberg Businessweek and Bloomberg Markets, and is syndicated in hundreds of newspapers globally. In covering the world with more than 2,300 news and multimedia professionals at 146 bureaus in 72 countries, we are experts in disseminating market moving information.

As I prepare this testimony, media and public interest groups appear to be making progress with the Department of Labor in arriving at policies on the dissemination of critical data that will hopefully not undermine the First Amendment, reduce the transparency and accuracy of critical data or create unacceptable cybersecurity risks. While no conclusive agreement has been reached, the movement we have seen would not have been possible without the engagement of this Committee, as well as the engagement of other Committees and Members – both Democrats and Republicans, in both the House and the Senate. We are particularly grateful to Senator Blunt for his engagement.

WHAT IS THE "LOCK-UP? A little background will help to make clear why the Department's April 10th proposed policy on the dissemination of employment statistics resulted in a firestorm of criticism and questions. Government agencies in the U.S. and Europe have developed a process known as a "lock-up". For at least the last 15 years, the Department of Labor (DOL) has utilized a lock-up to ensure the simultaneous release of monthly unemployment numbers and other economic indicators, including inflation reports. Over a dozen news organizations are cleared to participate in the release. Participating organizations arrive at the Department of Labor at 7:30 a.m. on the morning in which numbers are disseminated. At 8:00 a.m., participants surrender their mobile communications devices (blackberrys, phones, etc.) which are locked in a box at the front of the room. Communication is cut, and participants are locked in the room without the capacity to communicate to the outside world. Participants receive these numbers at 8:00 a.m. and are only able to utilize their own software to produce news stories that include historic context and analysis to accompany the release of the numbers. At 8:30 a.m. the DOL throws the switch permitting the simultaneous transmission of these stories via participants' own dedicated lines. The release is simultaneous, secure, and accompanied by context to enhance usefulness and accuracy. Other agencies of the U.S. Government -- and indeed foreign agencies throughout the developed world – manage the release of market moving news via processes very similar to those that are, theoretically, currently utilized by DOL.

The Government has recognized that giving the media meaningful pre-release access to economic data serves important public interests, including promoting a level playing field for all market participants, improving public understanding of the data and public confidence that the information transmitted is objective, credible and certain. The institutionalization of these 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)). 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)). In its Statistical Directive 4, OMB noted that giving the media pre-release access to data fostered, "improved public understanding of the data when they are first released and the accuracy of any initial commentary about the information contained in the product." (Id.) Along with stressing the importance of enhancing the utility of information and the accuracy of initial reporting, the Directive stresses the importance of simultaneous release of data to all interested parties and that 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.

The public has been well-served by this policy. Allowing the media to have meaningful pre-release access to economic data helps ensure a "level playing field" so that all market participants can make trading decisions based on fully-explicated data. Otherwise, sophisticated market participants would be able to gain an informational advantage by analyzing and distilling complex data more quickly than others.

DOL's PROPOSED APRIL 10TH POLICY. Without an appropriate notice-and-comment period, the DOL announced a dramatic new policy on April 10th. Henceforth, reporters would be required to use only government owned software, hardware, and lines. Indeed, reporters would be required to use government pens and notebooks. The use of modern news-producing software – with the greater accuracy and context it provides -- would be prohibited. All transmission will be via the internet, not via secure, redundant lines. The DOL would own and operate the data lines, internet access and internet connections – creating a single point of failure as all news agencies share the same infrastructure. Although this policy is unprecedented, the policy was presented as non-negotiable and a fait accompli. All news organizations cleared to participate in the DOL lockup were directed to remove their software, hardware, and dedicated lines from the DOL by June 15, 2012.

The problems outlined today would have been avoided had the DOL followed appropriate notice-and-comment rules of the Administrative Procedures Act (the “APA”). They did not. Under the APA, an agency cannot impose “rule” changes – which include procedural changes that impact the rights of third parties – without formally giving the public notice of the proposed rule changes and an opportunity to comment on them. The flaws in the DOL’s proposed lock-up rules illustrate the risks that agencies run when they ignore the statutory framework for rule-making. First, the notice-and-comment requirement ensures that agency rules are tested through exposure to a period of diverse public comment. Second, it ensures fairness to the parties affected by the proposed agency rules. Third, it gives the affected parties an opportunity to develop evidence in the record to support their objections to the rules. Here, the DOL ignored the Congressional directive embodied in the APA, and instead forced news media to try to negotiate changes to the proposal under the pressure of arbitrary deadlines, and without a full opportunity to help the DOL understand how a less draconian approach could serve its legitimate interests without trampling on cherished First Amendment rights.

PROBLEMS WITH THE DOL’S APRIL 10TH POLICY—THREAT TO THE FIRST AMENDMENT. Under the DOL proposal, the government would own and control the reporters’ notebook. This is an unheard of intrusion of government into one of most cherished freedoms. Except in those rare cases where it is ordered by a judge, unpublished newsgathering information is uniformly protected from compelled disclosure under the First Amendment. Unlike any other federal agency, the Department of Labor has asked that reporters write news articles on government-owned and operated computers, which gives the government unfettered access to reporters’ notes and drafts. We wish to make clear our view that no Administration should have access to a reporter’s thoughts, drafts and notes as a condition of covering the news, let alone news of such importance. The DOL’s proposal that reporters– rely solely on DOL computers and software, instead of their own proprietary data and analysis, effectively moves an independent press into a position uncomfortably close to that of a government deputized captive distributor.

PROBLEMS WITH THE DOL APRIL 10TH POLICY—REDUCED ACCURACY. Machines supplied by the DOL for news agencies to use in the lock-up events would be preinstalled with software owned by the DOL. Reporters would be deprived of needed background research and historical data, sometimes proprietary in nature, which resides in their own machines. Reporters would also be deprived of statistical interpretation tools to automate validation and fact-checking support to ensure accuracy. With the proposed DOL lock-up mechanism, none of these tools would be available, thus increasing the likelihood of mistakes.

PROBLEMS WITH THE DOL'S APRIL 10TH POLICY—THREAT TO NATIONAL SECURITY. The House, Senate, and the Administration have understandably spent a great deal of time this year attempting to address potential cybersecurity threats. Protecting our financial markets from disruption by cyber attack has been a key component of that discussion. Indeed, concerns about security are one reason why media companies in the financial realm have spent enormous sums installing secure, dedicated lines -- lines that entirely avoid the internet and its inherent vulnerabilities. In the world in which we live, for the DOL to affirmatively force the transmission of critical data away from secure, redundant, dedicated lines and instead mandate its transmission via the internet is inexplicable. To ensure the safety of these market-moving numbers, the DOL proposes using a common uplink from the DOL to the Internet, over which each news agency will communicate the data released from the lock-up event. Fundamentally, this represents a single-point-of-failure as an attacker 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 attack) happens routinely and are 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.

The vulnerability of the internet to even accidental disruption is a large part of the reason why news organizations have invested in these secure lines. Recently, the DOJ website was hacked, and government agencies regularly confront hacking that ranges from mere nuisance to serious problem. The prospects of deliberate disruption – and potential spoofing and market manipulation -- should be carefully weighed before moving to a less secure system. Indeed, even without sabotage, the Bureau of Labor Statistics website has crashed during the release of unemployment numbers. In August of 2011 the unemployment rate was not available online for over an hour ("the reason the website was down is that the service was overwhelmed by the number of inquires," said BLS spokeswoman Stacey Standish). This event last August was an inconvenience, not a catastrophe, because multiple news organizations, utilizing their own dedicated lines, were able to deliver this highly sensitive data to the market instantaneously. If the DOL's April 10th policy goes into effect, the next comparable failure will have grave consequences.

PROBLEMS WITH THE DOL'S APRIL 10TH POLICY – INCREASED MARKET VOLATILITY AND MARKET VULNERABILITY. The increased vulnerability of the internet -- coupled with the vagaries of internet routing which make it impossible to guarantee simultaneous delivery of this information – will result in increased market volatility and market vulnerability. The predictable monthly release of DOL numbers triggers an immediate surge in trading volume across asset classes, including the U.S. Treasury market, where average daily volume for primary dealers exceeds $400 billion a day and where rates set the benchmark for consumers and businesses.

In the modern market of computerized trading, traders compete in nanoseconds. Studies of the May 6, 2010 "Flash Crash" -- in which major equity indices plummeted 6% in a matter of minutes for reasons that are still unclear – illustrate how quickly small incidents can cascade into major disruptions in computerized markets. As the Securities and Exchange Commission ("SEC") and Consumer Financial Trade Commission ("CFTC") reported in, "Findings Regarding the Market Events of May 6, 2010," "One key lesson is that under stressed market conditions, the automated execution of a large sell order can trigger extreme price movements…the interaction between automated execution programs and algorithmic trading strategies can quickly erode liquidity and result in disorderly markets." Under the best case scenario, the combination of the non-simultaneous release of information --- and investors reacting to incomplete information – will create uncertainty and excessive volatility (i.e., market movement driven by quirks in the distribution of data, not an assessment of the data) and increased risk of market manipulation. These market inefficiencies and asymmetry of information raise basic questions regarding the appearance of fairness of the markets and jeopardizes participation in the financial markets. Under the worst case scenario, confusion surrounding the accuracy of employment numbers could trigger cascading computerized sell orders and a market meltdown.

WHAT PROBLEM IS THE DOL'S APRIL 10TH POLICY DESIGNED TO ADDRESS? When the DOL hosted a call on April 16th -- ostensibly to answer media questions on the new policy – I asked, "What is the problem you think, you imagine this will prevent? The DOL's response was, "I think we're going to move on. Operator, we'll take the next question."

The alleged rationale for the new policy has grudgingly slipped out in drips and drabs. DOL has stated that two journalists committed violations of existing policies and were disciplined. However, despite repeated questioning, the identities of the individuals, the nature of the offense, and the nature of the discipline have not been revealed. Without that information, it is unclear if the DOL proposal would actually address the alleged problem.

The DOL has alleged that its new policy is necessary because unauthorized individuals have planted unauthorized equipment in the lockup's communications closet. However, this is an argument for actually enforcing DOL's existing policy – which prohibits such conduct – not imposing the draconian new proposal advanced by the DOL. We concur that that it is a problem if, post 9/11, a government agency has no idea what equipment resides in their building and who has placed it there. Regardless, this problem is not addressed by the DOL's April 10th policy.

SANDIA REPORT. In recent weeks the DOL has begun referring to a consultant's report prepared by Sandia National Laboratories as providing the rationale and template for the April 10th policy. Of course, no one outside of DOL – not the Congress, the media, or the public that actually paid for the report – has been permitted to see it, and indeed DOL has not permitted Sandia to answer questions regarding the Report. DOL has circulated to the Hill a one-page "Executive Summary" dated August 2011. It's one brief page leads to a host of new questions.

The Sandia Report speaks of those who may oppose their recommendations ("adversaries") and notes that, "although they are willing to bend and potentially violate rules and law, violence is unlikely as an operational method." Does the DOL believe the media are "adversaries"? What rules and laws are we likely to break? On what evidence or experience is such a statement based?

The Sandia Summary continues by stating, "the apparent root cause for the issues driving this assessment is the possible presence of algorithmic traders and/or their agents in the press lockup facility." Has the lockup been infiltrated by hedge funds? The public, press and Congress are entitled to this information. Is it that difficult to distinguish between an authentic news organization and a hedge fund?

Most significantly, if the, "root cause of the issues driving this assessment" is the possible presence of algorithmic traders in the lockup, we suggest the DOL should have removed these individuals from the lockup back in August of 2011. Why wait until April 2012, to enunciate a policy that utilizes a grenade instead of a scalpel? Matching the medicine to the malady is usually critical and common sense. In this context, it is more than that: it is constitutionally compelled. Content-based restrictions are subject to "strict scrutiny", which require that the restrictions be "narrowly tailored" to serve a "compelling state interest." If the "root cause" of the DOL's concerns is the need to keep hedge funds from masquerading as news organizations, remedying that discrete problem could be easily done without promulgating the complex, destructive, and unconstitutional policy promulgated by the DOL.

The fact that we still face so many questions regarding what is driving this policy reminds us of the value of a transparent process. As discussed earlier, under the Administrative Procedures Act, an agency's substantive rules are subject to a notice-and-comment requirement. If the law had been followed here, or even if a serious, informal consultation had occurred, I suspect identifying direct solutions to discrete problems would have been simple.

MEDIA PROPOSAL. Since the announcement of these hearings -- and the fast-approach of the date by which an injunction would need to be sought to avoid the June 15th removal of the media's lines and equipment – discussions with the DOL have been productive. The Associated Press, Bloomberg LP, Dow Jones and Reuters jointly made a proposal to the DOL based on structures similar to the Departments of Agriculture and Commerce. While we have not been provided with information sufficient to permit us to assess all of DOL's concerns, I believe our proposal fully addresses the DOL's stated concerns.

CONCLUSION. We appreciate the Committee's engagement on this issue. The DOL policy announced April 10th represents a dramatic change from current practice, a change that raises serious questions regarding freedom of the press and market stability. The DOL proposal would diminish security, end the simultaneous delivery of data, reduce transparency and accuracy, increase market volatility and distrust of the markets while undermining the First Amendment. We are hopeful that the proposal made by the Associated Press, Bloomberg LP, Dow Jones and Reuters – a proposal based on proven systems at the Departments of Commerce and Agriculture that address DOLs stated concerns -- will be acceptable. In the alternative, we urge that the DOL institute a rulemaking that would – with the participation of the public in a transparent process – permit us to devise a system that addresses demonstrable concerns without dangerous, unintended consequences.

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Committee on Oversight and Government Reform
Witness Disclosure Requirement – "Truth in Testimony"
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Name: DANIEL MOSS

1. Please list any federal grants or contracts (including subgrants or subcontracts) you have received since October 1, 2009. Include the source and amount of each grant or contract.

NONE

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NONE

I certify that the above information is true and correct.

Signature: D. Moss

Date: 06/05/12

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Daniel J. Moss is one of 15 Executive Editors for Bloomberg News globally. Based in Washington D.C., Mr. Moss is responsible for Bloomberg's economic news from North America to East Asia and governments outside of the United States. Mr. Moss directs coverage of central banks, finance ministries, economic data, international financial institutions and political and government policy.

He joined Bloomberg News in 1994 as a reporter based in Sydney and was quickly promoted to bureau chief in Kuala Lumpur where he observed firsthand the dynamism of Southeast Asia as well as the region's response to the financial crisis that began in 1997. After a brief spell in Washington D.C. covering the International Monetary Fund and World Bank, Mr. Moss returned to Asia to run the Asian Economy team. From 2001 to 2006, he was based in London, in charge of news stories on the economics and politics of Western Europe, and then, global foreign exchange. From 2006 to 2007, he ran the North American economy team. Between 2007 and 2009, he was managing editor for economics.

Mr. Moss graduated from Australian National University in 1989 with a Bachelor of Arts degree. He majored in history and politics.