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Comment from The American Federation of Labor and Congress of Industrial Organizations

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General Comment

See the attached comments from the AFL-CIO.

Attachments

AFL-CIO comments - Form T-1 Rescission

UNITED STATES DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
OFFICE OF LABOR-MANAGEMENT STANDARDS

Rescission of Labor Organization Annual Financial Report for Trusts in Which a Labor Organization Is Interested, Form T-1

RIN 1245-AA12

COMMENTS OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

These comments on behalf of the American Federation of Labor and Congress of Industrial Organizations and its affiliated unions are submitted in response to the Department of Labor's notice of proposed rulemaking. 86 FR 28505 (May 27, 2021). The Department proposes to withdraw the Form T-1 rule issued on March 6, 2020 on the grounds that "the trust reporting required under the rule is overly broad and is not necessary to prevent the circumvention and evasion of the Title II reporting requirements." *Ibid*. *See* 85 FR 13414 (March 6, 2020). The AFL-CIO agrees that the reporting required by the 2020 final rule is overly broad and that it is not targeted at preventing evasion or circumvention of Title II reporting.

Title II of the Labor Management Reporting and Disclosure Act prescribes certain reporting requirements for "Labor Organizations, Officers and Employees of Labor Organizations, and Employers." 29 U.S.C. § 431 *et seq*. LMRDA § 208 authorizes the Secretary of Labor to issue "rules prescribing reports concerning trusts in which a labor organization is interested[] as he may find necessary to prevent the circumvention or evasion of [the LMRDA Title II] reporting

requirements." 29 U.S.C. § 438.

The 2020 final rule requires a labor organization to file with the Office of Labor Management Standards (OLMS) a Form T-1 report on any trust for which either a majority of the members of the trust's board were appointed by labor organizations or a majority of the trust's revenues were contributed by labor organizations. 85 FR at 13449. Collectively bargained employer-contributions are counted as labor organization contributions for purposes of meeting the reporting threshold. *Ibid.* The rule contains numerous exemptions from T-1 reporting for trusts that file similar reports with other governmental agencies. *Id.* at 13449-50.

The 2020 rule represents a wholly inappropriate attempt by OLMS to erase the distinction between benefit plan reporting and labor organization reporting enacted by Congress and thereby invade the province of the Employee Benefits Standards Administration (EBSA). The predictable result is that the Form T-1 reporting regime imposes undue burdens on both benefit plans and labor organizations. At the same time, the required reports will do very little to achieve the justifying aim of limiting misappropriation of apprenticeship plan assets.

The preamble to the 2020 final rule identifies four types of trust for which "most of the Form T-1s w[ould] be filed": "building trusts, strike funds, labor-management cooperation committees, and apprenticeship and training funds." 85 FR at 134535. The vast majority of building trusts and strike funds are financed by single labor organizations and thus would be reported on the labor organization's LM-2, not on a Form T-1. *Id.* at 13449-50. *See* 75 FR 74936, 74938-39 (Dec. 1,

2010) (reinstating subsidiary organization reporting on the Form LM-2). And, beyond stating that "labor-management cooperation committees" are expected to be subject to Form T-1 reporting, the preamble does not even describe what these committees are much less explain why they should be subject to the new reporting requirements. Concerns over these three other types of trust, thus, could not justify imposing the Form T-1 reporting obligations on labor organizations. Consequently, the 2020 Form T-1 rule rests almost exclusively on asserted financial abuses related to apprenticeship and training plans that do not file a Form 5500 report.

The reason given by the preamble to the 2020 Form T-1 rule for concluding that "additional financial reporting is necessary" are "[r]ecent cases of corruption and the continued potential for corruption within those trusts." 85 FR at 13438. To establish this predicate, the preamble cites instances of "the misuse of employer-contributed funds by . . . various apprenticeship and training plans." *Id.* at 13422. *See id.* at 13419 & n. 6 (reciting "examples [involving] apprenticeship and training funds established under LMRA section 302(c)(6)" to "illustrate recent situations in which funds held in section 3(l) trusts have been used in a manner that [justifies their being] subject to LMRDA reporting").

"Section 3(1) of the [Employment Retirement Income Security] Act defines the term 'employee welfare benefit plan' to include, among others, plans that provide apprenticeship or training programs." 45 FR 15527,15529 (March 11, 1980). *See* 29 U.S.C. § 1002(1). ERISA prescribes detailed annual reporting requirements for covered plans. 29 U.S.C. § 1023.

From the enactment of the LMRDA, Congress has distinguished regulation of employee benefit plans from regulation of labor organizations. "The LMRDA was the direct outgrowth of a Congressional investigation conducted by the Select Committee on Improper Activities in the Labor or Management Field, commonly known as the McClellan Committee." 85 FR at 13415. The McClellan Committee Report made five legislative recommendations:

"1. Legislation to regulate and control pension, health, and welfare funds;

2. Legislation to regulate and control union funds;

3. Legislation to insure union democracy;

4. Legislation to curb activities of middlemen in labor management disputes;

5. Legislation to clarify the 'no man's land' in labor management relations."

S. Rep. No. 1417, 85th Cong., 2d Sess. 450 (1958), quoted in 1 LMRDA Leg. Hist. 759-760 (within H.Rep. No. 741).

Senate Report No 187, 86th Cong., 1st Sess. (1959), notes these "five legislative recommendations" and observes that "[o]ne of these has been implemented in the passage of Public Law 85-836, the Welfare and Pension Plan Disclosure Act of 1958," while the other four recommendations (spelling out 2-5 from the list in the McClellan Committee report) "were subject of a bill, S. 3974, which passed the Senate [in 1958] . . . but failed to receive the approval of the House of Representatives." S. Rep. No. 187, p. 2, 1 LMRDA Leg. Hist. 398. The Report then explains that S. 1555, the bill being reported, "implements the remaining recommendations of the McClellan committee." *Ibid.* The LMRDA Title

II reporting requirements originated from Title I of S. 1555. *Id.* at 342-60.

In short, the "pension, health, and welfare funds" recommendation of the McClellan Committee was addressed in the Welfare and Pension Plan Disclosure Act of 1958, which was later superseded by ERISA, 29 U.S.C. 1031(a), and *not* in the LMRDA.

The Department of Labor requires ERISA plans to file annual financial reports on Form 5500. 29 CFR § 2520-103-1. The Department's Employee Benefit and Security Administration is responsible for regulating ERISA plans, including collecting and auditing the Form 5500 reports filed by such plans. *See* 68 FR 5374 (Feb. 3, 2003) (Delegation of Authority and Responsibility to the Employee Benefits Security Administration).

ERISA authorizes the Department of Labor to provide for exceptions from its reporting requirements. 29 U.S.C. § 1021(i)(5). The Department has allowed apprenticeship and training plans to file a short notice in lieu of filing the Form 5500. 29 CFR § 2520.104-22. To explain this exception, the Department stated that it "believes that to require administrators of apprenticeship plans to file with the Department, and to furnish those employees, all information required by [Title I of ERISA] would be unnecessarily burdensome and costly." 44 FR 33708, 33709 (June 12, 1979).

As the preamble to the 2020 Form T-1 rule recognizes, the information contained on a Form 5500 is very similar to what would be included in a Form T-1. 85 FR at 13421. To avoid "redundancy," the 2020 rule includes an exception from

Form T-1 reporting on trusts that file a Form 5500. *Id.* at 13424. Thus, requiring Form T-1 reports on apprenticeship and training plans that have not filed a Form 5500 appears to be little more than an attempt by OLMS to indirectly require the sort of financial reporting on such plans that the predecessor of EBSA determined "would be unnecessarily burdensome and costly." 44 FR at 33709. Nevertheless, the final rule acknowledges that "implementing regulations that would achieve additional disclosure from apprenticeship and training programs" is "outside . . . the purview of OLMS," being the responsibility of EBSA. 85 FR at 13425.

ERISA and LMRDA provide distinct regulatory regimes for benefit plans and for labor organizations, each regime having its own reporting requirements. LMRDA § 208 does not provide a basis for conflating the two regimes with regard to apprenticeship plans. The finances of apprenticeship plans have no relation to the "financial condition and operation" of labor organizations. Indeed, the employer contributions to such plans could not legally have gone into a labor organization treasury. 29 U.S.C. § 186(c)(6). *See Hearn v. McKay*, 603 F.3d 897, 902 (11th Cir. 2010) (plan assets are distinct from union assets). Thus, T-1 reporting on apprenticeship plans has no bearing on the annual labor organization financial reporting required by LMRDA § 201(b). 29 U.S.C. § 431(b).

The 2020 rule explains that the reporting evasions that would be addressed by Form T-1 reporting on apprenticeship plans "involve the Section 203 employer reporting requirements, as well as the related Section 202 union officer and employee conflict-of-interest disclosure requirements." 85 FR at 13422. But those

reporting requirements are implicated only if "the employer diverted unlawfully, funds intended for the trust to a union official." *Ibid.* And, if that is what OLMS thinks is going on, it should be the employers who file Form T-1 reports on apprenticeship plans and not labor organizations.

The articulated reason for requiring labor organizations to report on the finances of apprenticeship plans is to "prevent or deter the potential loss of millions of dollars of plan funds." 85 FR at 13433. But policing the finances of ERISA benefit plans is EBSA's job and not OLMS's responsibility. Indeed, a number of the instances of embezzlement noted by the preamble were uncovered by EBSA. 85 FR at 13419 ns. 8 & 10.

EBSA generally requires benefit plans to file annual financial reports on Form 5500. "The Form 5500 offers disclosure and accountability for . . . employee benefit welfare plans operated with a trust comparable to what the Form T-1 offers." 85 FR at 13424. That is why the 2020 rule included an exemption from Form T-1 reporting for apprenticeship plans that filed a Form 5500. As we have noted, EBSA's predecessor determined that requiring apprenticeship plans to file annual financial reports, such the Form 5500, "would be unnecessarily burdensome and costly." 44 FR at 33709. Despite suggestions conveyed by OLMS, EBSA has not required apprenticeship plans to file Form 5500 reports. *See* 85 FR at 13425.

Requiring labor organizations to file Form T-1 reports on apprenticeship plans is not only outside OLMS's authority under the LMRDA, the requirement places an impossible burden on the reporting labor organization's officers. "The labor

organization's president and treasurer . . . are personally responsible for filing the reports and for any statement in the reports known by them to be false." 85 FR at 13416. These officers are subject to criminal prosecution for dereliction of this responsibility. *Id*. at 13427. However, as the preamble repeatedly acknowledges, the labor organization will not possess the financial information necessary to file a Form T-1 report on an apprenticeship plan. *Id*. at 13425, 13428-29, 13433. Rather, the rule is premised on the "expect[ation] that the trusts will routinely and voluntarily comply in providing such information to reporting labor organizations." *Id*. at 13425. At the same time, the preamble observes that the administrators of plans cited to justify the Form T-1 reporting were guilty of "preparing and filing false tax returns . . . and deliberately providing misleading and incomplete testimony [to a] federal grand jury." *Id*. at 13421. Thus, the very premise of the 2020 T-1 rule strongly suggests that the information provided by the assertedly corrupt plans cannot be relied upon.

This problem does not arise with respect to Form 5500 reporting, because the plan is reporting on information it possesses and not relying on information supplied by a nonreporting entity. The Form 5500, moreover, is signed by the reporting plan's administrator, who is in a position to take responsibility for any misinformation.

The reporting labor organization's officers are also "responsible for maintaining records in sufficient detail to verify, explain, or clarify the accuracy and completeness of the reports." 85 FR at 13416. But with respect to Form T-1 reports on apprenticeship plans these records will not be in the possession of the reporting labor organization. The preamble does not attempt to explain how OLMS will go about auditing Form T-1 reports

filed by labor organizations that do not possess the underlying financial records.

Ignoring the anomalies created by requiring labor organization officers to vouch for information that they do not control, the preamble to the 2020 Form T-1 rule grossly discounts the costs of filing Form T-1 reports on apprenticeship plans. The preamble merely assumes that the operation of a training program will be as simple as that of a strike fund or building trust and "will have few disbursements, receipts, officers, and employees." 85 FR at 13435. At the same time, the preamble elsewhere acknowledges that apprenticeship plan expenditures are likely to include "salaries [of employees], instructor salaries, apprentice coordinator salaries, payments to vendors, suppliers, equipment manufacturers, training materials, website designers." *Id.* at 13429.

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OLMS does not have jurisdiction under the LMRDA to require labor organizations to report on the finances of ERISA plans for the purpose of preventing financial malfeasance by plan administrators. That task has been assigned to EBSA. Since policing the financial affairs of apprenticeship and training plans is effectively the sole substantive reason given for the 2020 Form T-1 rule, the entire rule should be withdrawn.

Respectfully submitted,

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