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Comment from United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry

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General Comment

See attached file(s)

Attachments

July 26 2021 UA Form T1 Comments

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July 26, 2021

Mr. Andrew Davis
Chief of the Division of Interpretations and Standards
Office of Labor-Management Standards
U.S. Department of Labor
200 Constitution Avenue N.W.
Room N-5609
Washington, DC 20210

Submitted Electronically through http://www.regulations.gov

Re: Comments on Proposed Rescission of Final Rule Establishing Form T-1 Report for Trusts in Which a Labor Organization is Interested Notice of RIN 1245-AA12

Dear Mr. Davis:

These comments are filed on behalf of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO ("United Association" or "UA") in response to the Department of Labor's Office of Labor-Management Standards ("Department") Notice of Proposed Rulemaking; Request for Comments ("NPRM") concerning its proposed recission of the Final Rule, 85 Fed. Reg. 13414 (Mar. 6, 2020) ("2020 Form T-1 Rule" or "Rule") which required certain labor organizations to file annual financial reports (Form T-1) with OLMS.

The United Association is an international labor organization representing over 359,000 plumbers, pipe fitters, sprinkler fitters, service technicians and welders. It is the leading trade union for all plumbing and pipe fitting trades. The United Association has 273 affiliated local unions, many of which have established trust funds under their respective collective bargaining agreements. Therefore, the United Association and its affiliated locals and trust funds stand to be greatly impacted by the 2020 Form T-1 Rule.

The United Association submits these comments in support of the Department's proposed rescission of the 2020 Form T-1 Rule. We agree with the conclusion that the Rule is overbroad and the burdens it would impose on unions and union members outweigh any supposed benefits. The United Associated raised these concerns in comments submitted in response to the May 30, 2019 Proposed Rule to establish the Form T-1. The United Association appreciates the opportunity to participate in this process and express its support of rescission of the 2020 Form T-1 Rule.

COMMENTS

I. The Rule is Overbroad.

The UA agrees with the Department's conclusion that the 2020 Form T-1 Rule should be rescinded because it is overbroad. As noted in the NPRM, Section 208 of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA") authorizes the Secretary of Labor to issue, amend and rescind rules and regulations to implement the LMRDA's reporting provisions, "(including rules prescribing reports concerning trusts in which a labor organization is interested) as [the Secretary] may find necessary to prevent the circumvention or evasion of such reporting requirements. . ." 29 U.S.C. § 438. The LMRDA therefore gives authority for the Secretary to require a union to report on trusts in which it is interested, but only if the reporting is determined to be necessary to prevent the union from circumventing or evading its reporting requirements under the LMRDA. *See also AFL-CIO v. Chao*, 409 F.3d 377, 386-87 (D.C. Cir. 2005).

The 2020 Form T-1 Rule is not necessary to prevent the circumvention or evasion of a union's reporting obligations. Significantly, the Rule requires unions to report on separate trusts that are established under the Taft-Hartley Act. Taft-Hartley funds, however, are not controlled by unions and, thus, reporting on Taft-Hartley trusts is not necessary to prevent the circumvention of union reporting requirements under the LMRDA. The Taft-Hartley Act makes this clear. First, employees and employers must be equally represented in the administration of Taft-Hartley funds, thereby preventing a union from exerting managerial control over the fund. 29 U.S.C. § 186(c)(5). Because the assets paid to and held by a Taft-Hartley fund are not assets of a union, a union cannot avoid its reporting obligations by transferring money from the union to the trust. Taft-Hartley trusts are funded by contributions made pursuant to a collective bargaining agreement. 29 U.S.C. § 186(c)(5). These contributions are not at any time under the union's control. Contributions that are made to a Taft-Hartley fund (both the fact that contributions are made at all, and the amount of those contributions) reflect the outcome of a collective bargaining process between the employer and unions. As the Department notes in the NPRM, employer contributions that are made to a Taft-Hartley fund may have otherwise been paid to an employer's employees as wages or benefits (or merely kept by the employer). In either event, these amounts would not be reportable by the union under the LMRDA, and it is therefore unclear how requiring reporting on such transactions would prevent a union from evading its own reporting obligations. In addition, employer contributions made to a Taft-Hartley fund do not represent amounts paid to a union for a union's own interests, as such payments are prohibited by law. 29 U.S.C. § 186(a). Finally, once contributions are made to a Taft-Hartley fund, they must be held in trust for the sole and exclusive benefit of the fund's participants and beneficiaries, to whom the trustees who administer such funds owe a duty of loyalty. *Id.*

For these reasons, the 2020 Form T-1 Rule's conclusion that employer contributions to a trust are assets of the union is a fundamental mischaracterization of the legal operation of these funds, and federal law dictates a different conclusion. The UA, therefore, strongly agrees with the Department's conclusion in the NPRM that money contributed by an employer to a Taft-Hartley fund not be considered property of the union, and would in no instance be reported by a union under the LMRDA reporting requirements.

Since the Rule is not necessary to prevent a union from circumventing or evading its reporting requirements under the LMRDA, it is beyond the scope of the Secretary's power. The UA agrees with the Department that the Rule should be rescinded on this basis.

II. The Burdens Imposed by the Rule on Unions and Union Members Far Outweigh Any Alleged Benefits.

The UA also agrees that any alleged benefits of the 2020 Form T-1 Rule are far outweighed by the burden imposed by the Rule. For the reasons explained above and in the NPRM, there is no evidence that the Rule is necessary to prevent a union from evading its reporting obligations under the LMRDA. Moreover, there is no evidence that the current reporting framework is insufficient to police any potential evasion of a union's reporting obligations pursuant to the LMRDA. As noted in the NPRM, a majority (if not all) of the trusts that will be reported on under the Rule are tax exempt entities that are required to file an annual Form 990 with the Internal Revenue Service. Copies of these Form 990s are available to the public generally. In addition, certain Taft-Hartley funds are already required to undergo an annual audit, and to provide the audit report to interested persons. 29 U.S.C. §§ 186(c)(5) and (6). The 2020 Form T-1 Rule did not explain why Form T-1 reporting was needed in addition to the Form 990 and annual audit. This lack of justification is especially puzzling in light of the partial audit exemption in the 2020 Form T-1 Rule. As a result of this partial exemption, the Rule would require certain Taft-Hartley funds to provide an audit report substantially similar to the one already required by law to be provided to interested persons. Given that there is no evidence of any need for the information targeted by the 2020 Form T-1 for the Department to police union reporting requirements under the LMRDA, any burden imposed by the Rule is unwarranted.

The burdens imposed by the Rule are significant, and will fall on covered funds, reporting unions, employers that contribute to the funds, and the Department. Funds covered by the Rule would be required to spend time and resources to capture the information that must be reported on the Form T-1. The Department has estimated these costs to total approximately $15,009,801 in the first year reporting is required. 85 Fed. Reg. at 13437. This is money covered funds would otherwise spend providing benefits to members or defraying other reasonable expenses of administering the fund. As a result, the Rule deprives participants and beneficiaries of significant benefits that would otherwise be expended on their behalf. While the Rule suggests that unions could reimburse funds for these expenses, shifting these costs to the union means the costs will ultimately be funded by union dues paid by union members. Moreover, there is no guarantee that the funds would be reimbursed by reporting unions, or that such arrangement would not be considered a prohibited transaction for those funds governed by the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). *See* 29 U.S.C. § 1106(a). The Rule therefore imposes a significant cost on union members and fund participants by depriving them of benefits that would otherwise be paid to or on their behalf. These benefits are needed now more than ever during this time of economic uncertainty due to the COVID-19 pandemic.

The UA shares the Department's concerns that the Rule's burdens on unions are heightened in two unnecessary ways. First, the 2020 Form T-1 Rule requires unions to report on financial transactions of certain trust funds. The information required to be provided on the Form T-1 is within the exclusive control of the trust funds. There is no guarantee that the funds will decide to capture the information needed to complete the Form T-1 or provide that information to the reporting union. Covered funds may determine that it is not an appropriate use of resources to

track the necessary information or to turn that information over to the union. This is especially likely for funds governed by ERISA, whose trustees have a fiduciary obligation to act in the sole and exclusive interest of participants and beneficiaries of the trust fund. The 2020 Form T-1 Rule provides no mechanism through which a union may compel a trust fund to produce the required information, and similarly provides no safe harbor exemption for unions that were unable to compel production of the necessary information from the covered trusts. Unions could, therefore, face insurmountable burdens posed by the 2020 Form T-1 Rule, and be entirely unable to comply with the reporting requirements set forth in the Rule through no fault of their own.

Second, the burdens posed by the 2020 Form T-1 Rule are increased by the fact that the Rule requires multiple unions to report on the same trust. Duplicative reporting increases the time and resources needed for the Department to review the Form T-1 reports. The 2020 Form T-1 Rule suggests that unions could jointly agree to designate one union to file for a covered trust and thus eliminate duplicative reporting. The UA agrees with the Department's determination that this proposed solution is unworkable. In many situations, it is unlikely that multiple unions would agree as to which union would file the Form T-1. This is especially true given that some covered funds receive contributions pursuant to collective bargaining agreements with unions in different trades and crafts. Different unions could interpret the Form T-1 reporting requirements differently, and therefore refuse to cede control of the reporting requirement to another union for fear that the report would be done incorrectly. The deadline for filing the Form T-1 further complicates the possibility of any arrangement among unions regarding Form T-1 filing. The 2020 Form T-1 Rule required the Form T-1 to be filed with the union's LM-2 no later than 90 days before the end of the union's fiscal year. Multiple unions that contribute to the same trust fund may not be on the same fiscal year. The Rule is not clear on whether a union would meet the deadline for Form T-1 filing if a union with a later fiscal year end date (and thus a later deadline to file the Form T-1) filed the required Form T-1. Finally, the Rule does not contain any provision granting leniency to a union who does not file a required Form T-1 because it relied in good faith on the understanding that another union would file the form on the reportable trust. It is unlikely that a union would risk noncompliance and substantial penalties by agreeing to let another union file a required Form T-1 on its behalf.

Contributing employers also face a significant burden as a result of the 2020 Form T-1 Rule. Most employers who sign a collective bargaining agreement with the UA and its affiliated local unions agree to pay a set dollar amount per hour worked to one or more jointly administered trust funds. The instructions to the 2020 Form T-1 require filers using the limited audit exception to produce an audit which includes, among other things, a statement of trust receipts for the year aggregated by general source, the names of the parties with which the trust engaged in $10,000 or more of commerce, and the total of the transactions with each party. Unions making use of the limited audit exemption must therefore disclose the name of each contributing employer and the amount received by each employer during the reporting year. 85 Fed. Reg. at 13450-51. Disclosure of this information would permit anyone, including the employer's competitors, to calculate the hours worked by the contributing employer's employees. Employers may have legitimate business reasons to want to keep this information private. Among other things, competitors would be free to use this information to undermine the contributing employer's business. The threat to contributing employer's business interests is an additional burden imposed by the Rule.

Finally, it is the UA's opinion that the 2020 Form T-1 Rule would require significant resources from the Department for enforcement and compliance assistance. The United Association and its affiliated unions have internally raised questions about the Form T-1 filing requirements that would need clarification from the Department. The UA also foresees significant issues with filing. As explained above, many unions may not be able to get the information needed for the Form T-1 from covered trust funds. Other unions may not have a Form T-1 filed in time if another union has agreed to file it on behalf of the covered trust. The UA and its affiliated locals would seek assistance from the Department in resolving these and other issues created by the 2020 Form T-1 Rule. Such assistance would necessitate the Department to spend time and resources on compliance with the Rule. Additional time and resources would no doubt be required to administer and police the reporting requirement created by the Rule. It is the UA's opinion that these resources are sorely needed elsewhere within the Department.

CONCLUSION

For the foregoing reasons, the United Association strongly supports the proposed recission of the Final Rule establishing the Form T-1. We welcome the opportunity to provide further explanation or to answer any questions you may have.

Respectfully submitted,

Ellen O. Boardman
General Counsel
United Association

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