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NPRM to Rescind Form T-1

Comment On: LMSO-2021-0001-0001
Rescission of Labor Organization Annual Financial Report for Trusts in Which a Labor Organization is Interested, Form T-1

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Comment from North America's Building Trades Unions (NABTU)

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General Comment

See attached file(s)

Attachments

NABTU Comments on T-1 Recission_FINAL

COMMENTS OF
NORTH AMERICA'S BUILDING TRADES UNIONS
ON THE OFFICE OF LABOR-MANAGEMENT STANDARD'S PROPOSED RULE ON RESCINDING FORM T-1 REPORTING REQUIREMENTS

RIN 1245-AA12

North America's Building Trades Unions ("NABTU") appreciates the opportunity to comment on the Office of Labor-Management Standards' ("OLMS") notice of proposed rulemaking on the recission of Form T-1 – an annual financial report to be filed by labor organizations on behalf of certain trusts, including apprenticeship and training funds. *Recission of Labor Organization Annual Financial Report for Trusts in Which a Labor Organization is Interested, Form T-1*, 86 Fed. Reg. 28505 (May 27, 2021)("NPRM").

NABTU is a labor organization composed of fourteen affiliated national and international unions, with 291 state and local building and construction trades councils throughout the United States, which together represent more than three million men and women. In partnership with construction industry employers, NABTU's affiliates have long sponsored and promoted registered apprenticeship programs for bringing new workers into the construction industry, training them to understand all aspects of a trade, and providing them with the skills to safely perform complex tasks under ever-changing conditions. These joint labor-management apprenticeship programs comprise one of the largest post-secondary education programs in the country. Together, NABTU's affiliates sponsor over 1,600 apprenticeship programs that have prepared hundreds of thousands of workers for good, middle-class careers. In the past 10 years, 494,000 apprentices have graduated from building trades apprenticeship programs, a number that would have been higher had it not been for the Great Recession. Accordingly, NABTU has a vested interest in the reporting requirements imposed on such programs by Form T-1.

NABTU agrees with the NPRM that the rule implementing Form T-1 ("2020 Form T-1 rule"), 85 Fed. Reg. 13414 (March 6, 2020), must be withdrawn and with the comments and recommendations of the AFL-CIO, which are incorporated herein.

The 2020 Form T-1 rule requires that labor organizations submit annual financial reports on four types of trusts: building trusts, strike funds, labor-management cooperation committees, and apprenticeship and training funds. *Id*. at 13435. In justifying these burdensome and often duplicative reporting requirements, the agency relied solely on a handful of financial mismanagement cases relating to apprenticeship and training funds. *Id*. at 13419. As the AFL-CIO's comments explain, reporting requirements for apprenticeship funds are outside of OLMS's jurisdiction. Moreover, reporting under Form T-1 will not address OLMS's concerns regarding the purported mismanagement of such trusts. Union officers who are required by the rule to complete Form T-1 and swear under penalty of perjury that the information submitted is true and correct, do not manage such funds nor do they have first-hand knowledge of the information needed to complete the form.

Although apprenticeship and training trust funds are established through collective bargaining, such funds are managed exclusively by trustees who owe a fiduciary duty to the funds. As a result, as the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States explains in its comments, there is no guarantee that fund trustees will choose to capture the information needed to complete Form T-1, or provide that information to the reporting union. In fact, trustees of joint labor-management apprenticeship funds – who have an obligation to act in the sole and exclusive interest of participants and beneficiaries of the trust fund – may determine that such data collection is not an appropriate use of trust fund resources.

The Supreme Court has held that trustees of similar joint labor-management funds do not simultaneously serve as agents of the employer or labor union because trustees "bear[] an unwavering duty of complete loyalty to the beneficiary of the trust, to the exclusion of the interests of all other parties." *NLRB v. Amax Coal Co*., 453 U.S. 322, 329 (1981). "To deter the trustee from all temptation and to prevent any possible injury to the beneficiary, the rule against a trustee dividing his loyalties must be enforced with uncompromising rigidity." *Id*. at 330. Although *Amax Coal* addressed joint pension and welfare trust funds under Section 302(c)(5) of the Labor Management Relations Act ("LMRA"), the holding has been interpreted as also applying to apprenticeship and training trust funds under Section 302(c)(6) of the LMRA. *See, e.g., Gregg v. IBEW Local 305*, 2010 BL 258572 *14 (N.D. Ind. Nov. 1, 2010) (dismissing local union from claim brought against apprenticeship fund and holding that under *Amax Coal*, the dual role of a union officer and apprenticeship fund trustee does not create vicarious liability).

In promulgating the 2020 Form T-1 rule, OLMS failed to adequately explain and justify the need for enhanced reporting requirements with respect to any category of trust. In issuing its broad reporting mandate, OLMS focused exclusively on issues concerning apprenticeship trusts. Specifically, OLMS provided *five* examples out of thousands of apprenticeship training programs nationwide. As to the other categories of trusts, the agency provided no evidence substantiating its claims of mismanagement.

An agency must offer a "rational connection between the facts found and the choices made." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). In *New York v. HHS*, 414 F. Supp. 3d 475, 541 (S.D.N.Y. 2019), for example, the court vacated a rule of the Department of Health and Human Services ("HHS") because it was based on concerns unsubstantiated by the agency. Among other things, the HHS rule sought to increase the

agency's enforcement of the statutory right of health care providers who receive federal assistance to abstain from providing medical services on account of religious or moral objections. HHS stated that an increase in complaints by employees of covered health care providers and inadequate enforcement tools caused it to act. *Id.* at 506. The rule also sought to define certain statutory terms in a manner that expanded the rule's coverage. Upon review of the administrative complaints on which HHS relied, the court concluded that "virtually none address" the religious objector rights at issue "let alone indicate a deficiency in the agency's enforcement capabilities" as to those rights. *Id.* at 541. The court found that a mere 6 percent of complaints to HHS were potentially related to objector rights. The court explained that "where there is 'no direct evidence' to support an agency's decision, that decision is arbitrary and capricious." *Id.* at 545 (quoting *State Farm*, 463 U.S. at 52-53).

The court further noted that even if the complaints to HHS had demonstrated an increase in violations and a need for enhanced enforcement tools, HHS had not pointed to evidence substantiating the need for broad definitions extending religious and moral objector rights to schedulers, receptionists, and billing department clerks employed by health care providers. Thus, the court concluded that HHS's rule "did not respond to any documented problem." *Id.* at 546.

Like the rule in *New York v. HHS*, the 2020 Form T-1 rule "represents a classic solution in search of a problem." *Id*. at 546; *see also Nat'l Nutritional Foods Ass'n v.*, *Goyan*, 493 F. Supp. 1044 , 1046 (S.D.N.Y. 1980) (a "regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist."); *ALLTEL Corp. v. FCC*, 838 F.2d 551, 561 (D.C. Cir. 1988) ("We do, of course, accord deference to a determination by the [agency] that a problem exists within its regulatory domain, but deference is not a blank

check."). For this reason alone, the rule's promulgation was arbitrary and capricious and must be rescinded. *New York v. HHS*, 414 F. Supp. 3d at 546.

Accordingly, for the reasons set forth above and in the AFL-CIO's comments, NABTU agrees that OLMS should withdraw the 2020 Form T-1 rule.