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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 Laborers' International Union of North America

Submitter Information

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General Comment

See attached file(s)

Attachments

RIN 1245-AA12 - Recission Of Form T-1 Reg - LIUNA Comments



LIUNA!

TERRY O'SULLIVAN
General President

via www.regulations.gov

July 23, 2021

ARMAND E. SABITONI
General Secretary-Treasurer

To The United States Department of Labor
Office of Labor-Management Standards:

Vice Presidents:

Re: RIN 1245-AA12: Recission of Labor Organization Annual Financial Report for
Trusts in Which a Labor Organization is Interested, Form T-1

TERRENCE M. HEALY

NPRM, 86 FR 28505 (May 27, 2021)

RAYMOND M. POCINO

JOSEPH S. MANCINELLI

COMMENTS OF THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA

ROCCO DAVIS
Special Assistant to the
General President

Greetings:

VINCENT R. MASINO

On behalf of the 500,000 proud and strong members of the Laborers' International Union of North America (LIUNA), I submit the following comments in strong support of the proposal by the Department of Labor's Office of Labor-Management Standards ("OLMS") to rescind the 2020 Form T-1 Rule ("the 2020 Rule"). We commend the OLMS for having the integrity and courage to undo a cynical regulation that exceeds the agency's legal authority, that perverts the law, that is unworkable in practice, and that is unjust.

DENNIS L. MARTIRE

ROBERT E. RICHARDSON

RALPH E. COLE

JOHN F. PENN

LIUNA's Interest In The Proposed Recission Of The 2020 Form T-1 Rule

OSCAR DE LA TORRE

SERGIO RASCON

LIUNA is an international labor organization regulated by the Labor Management Reporting and Disclosure Act ("LMRDA"). In accordance with the LMRDA and OLMS regulations, LIUNA files annual financial reports (Form LM-2) with the OLMS. LIUNA has many affiliated Local Unions and District Councils throughout the United States that are also regulated by the LMRDA and file annual LM reports with the OLMS. LIUNA and its affiliates participate in various jointly administered labor-management organizations that are "trusts" in which they are interested within the meaning of the LMRDA (29 U.S.C. §402(l)) and regarding which they may be wrongly required to file annually a Form T-1 under the 2020 Rule.

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Comments On The Proposed Recission Of The 2020 Form T-1 Rule

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Point 1: The 2020 Rule is fatally flawed in mischaracterizing collectively bargained employer contributions to trusts as union contributions in an effort to evade LMRDA limitations on the agency's regulatory authority. Employer contributions are never union money because the Taft-Hartley Act forbids it.

Feel the Power

The Secretary lacks any authority under the LMRDA to require a trust to directly report on their own finances and operations to the OLMS. The OLMS can require a labor organization to submit financial reports regarding a trust only if such reporting is necessary to prevent circumvention or evasion of the labor organization's own LMRDA reporting obligations. This limitation is clearly stated in the LMRDA, 29 U.S.C. §438. *See also AFL-CIO v. Chao*, 409 F.3d 377, 386-387 (D.C. Cir. 2005).

The 2020 Rule, like its ill-fated predecessors, assumes that such preventive measures are necessary where a labor organization has either managerial dominance or financial dominance over a trust. A labor organization is assumed to have managerial dominance if it (alone or in combination with other labor organizations) appoints a majority of the trust's governing board (*e.g.* board of trustees). A labor organization is assumed to have financial dominance and control if it (alone or in combination with other labor organizations) makes contributions to the trust that exceed 50% of the trust's receipts during a fiscal year. For purposes of the financial dominance test, the 2020 Rule perversely treats employers' contributions to a trust as if they were made by a union.

This mischaracterization of employer contributions as union contributions to a trust is grossly inconsistent with well-established labor and tax law. Employer contributions are never union assets. Under the Labor Management Relations (Taft-Hartley) Act, Section 302, employers are generally prohibited from paying money or other things of value to a labor organization, including collectively bargained contributions. Employer contributions can only be paid to a joint labor-management trust meeting certain structural requirements. *See* 29 U.S.C. §186(c). Under the Internal Revenue Code, collectively bargained employer contributions to a benefit plan trust are employer contributions. *See* Internal Revenue Manual Section 4.72.14, Multiemployer Plan Examination Guidelines. Various laws administered by the Labor Department itself treat employer contributions to trusts as employer contributions, not union assets. For example, the Employee Retirement Income Security Act ("ERISA") requires employers to comply with collective bargaining agreements obligating them to contribute to benefit trusts. *See* 29 U.S.C. §1145. Regulations issued under the Service Contract Act provide for employers to satisfy their wage determination obligations by making "fringe benefit" contributions to labor-management benefit trust funds. *See* 29 CFR §§ 4.170 and 4.171.

Even accepting that collectively bargained employer contributions to benefit funds and other trusts are substitute wages, those wages would have been paid to the workers, not to their union, by the employer. The wages would not have been reported on any union's LM report.

Under the 2020 Rule's deceptive reasoning, if a trust is funded solely by collectively bargained employer contributions, it is automatically treated as being controlled by the labor organization even though the trust is governed by a board of trustees composed of equal numbers of employer and union trustees in accordance with the Labor Management Relations (Taft-Hartley) Act Section 302(c). This is absurd. The union did not make any contributions to the trust, and it cannot control the trust's governance because employer-appointed trustees have equal say in the trust's administration.

LIUNA has for many decades participated in sponsoring many joint labor-management trusts including pension funds, health and welfare funds, training funds, and labor-management cooperation funds. These funds are jointly governed by labor and management trustees. Some are funded solely by collectively bargained employer contributions, and some by affiliation fees paid by other labor-management trusts. LIUNA does not control these trusts; their joint labor-management boards of trustees do. These trusts are separate legal entities, distinct from LIUNA as a matter of law. *See, e.g. Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559 (1985); *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981). These trusts file their own Form 5500 annual financial reports with the Labor Department's Employee Benefits Security Administration ("EBSA") and/or their own Form 990 annual financial reports with the Internal Revenue Service ("IRS") based on annual financial audits by independent certified public accountants. To protect the trust's assets against the risks of financial malfeasance, the trusts carry fiduciary liability insurance and fidelity bonds.

In sum, the 2020 Rule's treatment of collectively bargained employer contributions as union contributions is a distortion of law and reality in the service of an illusion that unions are circumventing or evading their LMRDA reporting obligations through trusts. Without this false premise, the 2020 Rule's illegitimacy is laid bare. Funding of a trust through collectively bargained employer contributions does not put a labor organization in a position to use the trust to circumvent or evade any LMRDA reporting obligation.

Point 2: Form T-1 reporting is a redundant and wholly unnecessary regulatory burden. Trusts already submit detailed annual financial reports to the Government that are available to union members and the public at large. Union members are also entitled by the Taft-Hartley Act to review annual financial audits.

Joint labor-management pension funds and health and welfare funds regulated by the ERISA submit detailed Form 5500 annual financial reports to the Labor Department's Employee Benefits Security Administration ("EBSA"). These annual reports are publicly available through the EBSA, and can be accessed by union members. Joint labor-management training funds and cooperation trusts, as tax-exempt organizations under Section 501(c) of the Internal Revenue Code, file detailed Form 990 annual financial reports with the Internal Revenue Service. These annual reports must be made publicly available and can be accessed by union members. As noted in the NPRM: "These forms provide the type of financial information that interested parties such as union members could use to monitor the use of trust funds in order to prevent circumvention or evasion of Title II." (86 FR 28505, 28510).

To complete the Forms 5500 and 990, these organizations undergo annual financial audits by certified public accounts. Annual financial audits are also required by the Taft-Hartley Act for joint labor-management funds, and the audit reports must be available for inspection by "interested persons", including union members, "at the principal office of the trust fund." *See* 29 U.S.C. §186(c).

In short, Form T-1 reporting by labor organizations is not needed to provide union members with access to financial information about trusts in which their union has an interest. The trusts themselves already provide annual financial reporting to the Labor

Department and/or the IRS, and those reports are available to members and the public at large.

Point 3: The 2020 Rule is unworkable as a practical matter. It requires labor organizations to obtain audited financial information from separate legal entities within an unreasonably short amount of time.

The trusts are separate legal entities, distinct from the labor organization or organizations that have an interest in them. The trusts are governed by joint labor-management boards of trustees owing fiduciary duties to the trust, not the labor organization(s).

The 2020 Rule would require each labor organization with an interest in any particular trust to obtain from the trust the financial data and other information required to complete the T-1. Further, the labor organization(s) would be required to obtain that information in time to complete a T-1 and submit it to OLMS with its LM-2 report by the unextendable deadline of 90 days following the end of the labor organization's fiscal year (March 31st for organizations with a calendar year fiscal year). The T-1 would have to cover the trust's most recently completed fiscal year ending on or before 90 days prior to the labor organization's fiscal year.

That is an unrealistic mandate. It is unlikely that a trust would have its financial audit of the prior year's financial statements completed in time to provide the required information to the requesting labor organization(s). For the trust themselves, the Form 5500 is not due until the last day of the seventh month after the plan year ends (July 31st for a calendar year plan), and that deadline can be extended. The Form 990 is not due until the 15th day of the fifth month following the end of the organization's taxable year (May 15th for a calendar year tax year), and that deadline is extendable too. The trust has no need for its own purposes to complete its annual audit in time for any labor organization's LM filing deadline. Moreover, a trust's officials may reasonably view the T-1 filing requirement as the labor organization's obligation and not a matter on which trust resources should be expended, especially if additional costs would be incurred to meet the labor organization's LM / T-1 filing deadline.

The labor organization has no way to compel the trust to provide the information in time for the labor organization to complete the T-1 and file it with the LM report by the 90th day. The Labor Department has no authority to command a trust to provide a labor organization with information needed to complete a T-1. As the NPRM confirms: "Furthermore, trusts are under no legal obligation to provide their records to the union for the sake of the union's reporting requirement." (86 FR 28505, 28510).

Where multiple labor organizations are each required to file a T-1 for a particular trust, a trust can be expected to be even more reluctant to cooperate.

Regulations like the 2020 Rule that are impractical, if not impossible, to comply with undermine respect for government authority and the rule of law. The 2020 Rule fuels cynicism regarding the OLMS and the Labor Department as a whole. It is a waste of resources for all parties, including the OLMS, particularly when the financial information demanded by the T-1 is already available through Forms 5500 and 990.

Point 4: The 2020 Rule is unjust. It requires union officers to sign a Form T-1 certifying, under oath, the accuracy and completeness of information provided by trusts.

The Form T-1 promulgated as part of the 2020 Rule requires the President and Treasurer of the labor organization filing the T-1 to sign the T-1 under the following certification:

“Each of the undersigned, duly authorized officers of the above labor organization, declares, under penalty of perjury and other applicable penalties of law, that all of the information submitted in this report (including the information contained in any accompanying documents) has been examined by the signatory and is, to the best of the undersigned’s knowledge and belief, true, correct, and complete.”

This is an unreasonable and unjust requirement. It is one thing for union officers to be required to certify their own union’s LM report. It is quite another, fundamentally wrong, thing to require union officers to certify information provided by third parties.

The union’s officers will not know whether the financial data and other information provided by a trust to the union is “true, correct, and complete”. As noted above, trusts are separate legal entities governed by boards that may include some union-appointed trustees but which are not controlled by the union. Trust officials do sign and certify the information contained in Form 5500 and Form 990 reports submitted to the Labor Department and the IRS because that is the trust’s own information. Union officials should not be required to certify T-1 reports containing information provided by a third party, the trust.

Conclusion: In conclusion, we urge the OLMS to issue a final regulation rescinding the 2020 Rule in its entirety as soon as possible.

Respectfully submitted,


TERRY O'SULLIVAN
General President