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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

Document: LMSO-2021-0001-DRAFT-0002
Comment from United Brotherhood of Carpenters and Joiners of America

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General Comment

See attached file(s)

Attachments

UBC T-1 comments (RIN 1245-AA12)

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

Douglas J. McCarron
General President

June 22, 2021

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, D.C. 20210

Re: Request for Comments, RIN 1245-AA12

Dear Mr. Davis:

I am writing on behalf of the United Brotherhood of Carpenters and Joiners of America ("UBC") in response to the request for comments with respect to the proposal to rescind the Form T-1, i.e., the proposal to rescind the final rule published in the Federal Register on March 6, 2020, 85 FR 13414 ("2020 Form T-1 rule").

While the UBC recognizes the importance of preventing the circumvention or evasion of the reporting requirements under Title II of the Labor-Management Reporting and Disclosure Act ("LMRDA"), it believes the 2020 Form T-1 rule does not help achieve this goal. The UBC agrees with the Department of Labor ("DOL") that the 2020 Form T-1 rule should be rescinded because "the trust reporting required under the rule is overly broad, as it includes exclusively employer-funded trusts" which are not funds of a labor organization and the "separate reporting requirements set forth in the 2020 Form T-1 rule are not justified in light of the burden they impose." 86 FR 28508. For these reasons, the UBC believes the form should be rescinded. Alternatively, the form should be scaled back.

I. The Test For Determining Whether a Labor Organization Needs to File a Form T-1, and the Rule's Exemptions, Results in Overbroad and Unduly Burdensome Reporting Requirements

The 2020 Form T-1 rule is to require a labor organization with total annual receipts of $250,000 or more (and that therefore is obliged to file the LM-2) to file a Form T-1 each year for each trust that meets the "trust in which a labor organization is interested" definition in section 3(l) of the LMRDA, 29 U.S.C. § 402, and with respect to which the "financial dominance" or the "managerial dominance" test is met, unless there is an exemption.

Section 3(l) defines a "Trust in which a labor organization is interested" as follows:

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> Trust in which a labor organization is interested" means a trust or other fund or organization (1) which was created or established by a labor organization, or one or more of the trustees or one or more members of the governing body of which is selected or appointed by a labor organization, and (2) a primary purpose of which is to provide benefits for the members of such labor organization or their beneficiaries.

29 U.S.C. § 402(l). "Such labor organizations will trigger the Form T-1 reporting requirements, subject to certain exemptions, where the labor organization during the reporting period, either alone or in combination with other labor organizations, selects or appoints the majority of the members of the trust's governing board or contributes more than 50 percent of the trust's receipts." 85 FR 13414. "When applying this financial or managerial dominance test, contributions made pursuant to a collective bargaining agreement (CBA) shall be considered the labor organization's contributions." *Id.*

The UBC objects to the 2020 Form T-1 rule for several reasons which are further explained below. First, the 2020 Form T-1 rule erroneously assumes contributions paid by an employer pursuant to a CBA are under the control of the labor organization. Second, also due to this false assumption, such forms would have to be filed for labor-management cooperation funds even though they are not controlled by any labor organization, and the rule does not provide for an exemption for such funds. Third, there is no *de minimis* exemption for the reporting requirement, such that contributions of as little as $1 by any given labor organization may trigger reporting requirements by that labor organization. Fourth, the "in combination with" test does not screen for labor organizations that exercise dominion over a trust fund, resulting in potentially multiple reports for the same trust fund. Fifth, there is no minimum dollar amount for the trust fund to trigger the reporting requirements. Additionally, the rule does not adequately protect confidential information in case the union exercises the option to file an audit instead of the full form. For these reasons, the rule is overbroad and overly burdensome.

A. The Rule Erroneously Assumes Contributions Paid by an Employer Pursuant to a CBA are Under the Control of the Labor Organization

Under the 2020 Form T-1 rule, employer contributions made pursuant to a collective bargaining agreement ("CBA") are considered the labor organization's contributions, such that the "financial dominance" test is met when it otherwise would not have been met. Funds contributed to Section 3(l) trusts by employers pursuant to CBA's are, by law, not union money. Treating them as such for purposes of this rule sets a dangerous precedent that is inconsistent with current law and likely to confuse union members.

Money from employers that is contributed to a Section 3(l) trust is not money controlled by labor organizations. Employers are separate business entities that have their own assets, management, employees, and business operations. The fact that an employer may have entered into a CBA with a labor organization that obliges the employer to contribute to a Section 3(l)

trust does not mean that the labor organization has any control or authority over the disposition of the employer's assets. If the employer fails to make the contribution, the labor organization will file a grievance against the employer if the failure to contribute falls within the arbitration clause of the CBA or, if not, it will file a lawsuit pursuant to Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, for violating the contract. In either case, the dispute is treated as one involving the employer's breach of its contractual obligation to contribute to the fund, not as a dispute over the employer holding on to the union's money.

Additionally, under Section 302 of the LMRA, 29 U.S.C. § 186, contributions made by an employer to a fund established by a labor organization that represents employees of the employer are considered to be money from the employer, not money of the labor organization. Indeed, it is because such money is from an employer that a violation occurs with respect to such payment absent an exception under Section 302(c) of the LMRA.

Thus, contributions made by an employer to a fund pursuant to a CBA are not funds that are controlled by the union, and the law does not treat them as such. The union does not have financial dominance over this money. If there is an agreement between person A and person B pursuant to which B makes payments to a third party, the law would not treat person A as exercising control over the money, and this is exactly the kind of unreasonable assumption the 2020 Form T-1 rule makes.

The DOL, when it published the 2020 Form T-1 rule, maintained at the time that the legal separateness of a Section 3(l) trust does not protect against corruption by union leaders who "might engage in corrupt activities to misdirect union funds with an entity wholly separate from the union," and neither does the "requirement [of section 302 of the LMRA] that the trust's governing board be composed of an equal number of union and employer representatives[.]" 85 FR 13421; 29 USC § 186(c)(5). However, while corrupt individuals may devise schemes to divert money to union officers, the fact that the contributions to the trust are made pursuant to a CBA does not mean the union controls the money and is the right entity to make the T-1 disclosures.

Further, under Section 302, there already is transparency as to funds to which employers contribute pursuant to a CBA, since there must be an annual audit of such trust funds, "a statement of the results of which shall be available for inspection by interested persons." 29 USC § 186(c)(5). The annual Form T-1 is therefore of marginal benefit with respect to creating transparency as to contributions paid by employers pursuant to a CBA and requiring labor organizations to submit reports on such trust funds would be pursuant to a false presumption that labor organizations control such funds.

B. There is no Exemption for Labor Management Cooperation Funds Even Though They are not Controlled by the Labor Organization

While the 2020 Form T-1 rule included a number of exemptions, including apprenticeship and training funds that file a Form 5500, 85 FR 13425, there is no exemption for a labor-management cooperation committee established under section 302(c)(9) of the LMRA, 29 U.S.C. § 186.

A labor-management cooperation fund whose board consists of members half of whom are selected by the labor organization, and half by employers, is not controlled by the labor organization simply because the fund is funded by contributions from signatory employers. The separateness of such funds is recognized by LMRA section 302(c)(9). The absence of an exemption for labor-management cooperation funds is another reason why the 2020 Form T-1 rule is overbroad. It is an example of the type of fund for which a labor organization would have to file a Form T-1 even though the labor organization does not control the fund.

The statutory authority the Department relied on in publishing the 2020 Form T-1 rule is Section 208 of the LMRDA, which provides that the Secretary of Labor "shall have authority to issue, amend, and rescind rules and regulations prescribing the form and publication of reports required to be filed under [the Act] and such other reasonable rules and regulations . . . as he may find necessary to prevent the circumvention or evasion of such reporting requirements." 29 U.S.C. § 438. Labor organizations would not be circumventing or evading reporting requirements if they are not required to report on funds they do not control, and they do not control funds when they select/appoint only half of the governing board of the fund that is funded by contributions from signatory employers. Requiring labor organizations to report on such funds is therefore outside of the statutory authority.

C. The Lack of a *De Minimis* Exemption Will not Only Cause an Undue Burden on Labor Organizations but Will Also Cause Confusion on the Part of the Public as to Exactly how Much a Reporting Labor Organization Contributed if it Contributed Less than $10,000 to the Fund

The UBC has concerns about the fact that there is no *minimis* exemption to the reporting requirement. There are two major problems with this. First, contributing as little as $1 may trigger the reporting requirement by a labor organization, causing much time to be spent on something that is likely of very little interest to members and will be duplicated by other labor organizations. Second, members will be confused as to how much their labor organization contributed, and why it is filing the report in the first place, if it contributed less than $10,000, as the amount of contribution will not be disclosed on the Form T-1.

Because the filing requirement applies when *either* the managerial dominance or the financial dominance test is met, a labor organization may have to file a report even if it makes a *de minimis* contribution and had no say in the selection or appointment of the trust's governing board. Specifically, a labor organization with total annual receipts of at least $250,000 would

have to file the report with respect to a 3(l) trust even if the labor organization did not select or appoint *any* member of the trust's governing board if it contributed as little as $1 to the trust fund, as long as the total amount contributed by labor organizations—and/or pursuant to the CBA's to which they are signatories—makes up more than 50% of the trust's receipts.

Not only will the reporting requirement result in duplicative T-1 reports from labor organizations which contributed a minimal amount to the fund, it will also impose an undue burden on a labor organization in terms of having to gather the required financial information about the trust fund to which the labor organization made a minor contribution. Such information-gathering may involve collecting information as to whether other labor organizations have contributed to the fund, and in what amounts, such that the financial dominance test is met in the first place. Holding the president and treasurer of the labor organization, or the corresponding principal officers, personally responsible for the filing of the report and to require them to maintain data necessary to verify the reported information for at least five years, 85 FR 13452-13453, is unreasonable in situations where the labor organization's contribution is minimal.

As stated in the 2020 Form T-1 rule, "[t]he LMRDA's various reporting provisions are designed to empower labor organization members by providing them the means to maintain democratic control over their labor organizations and ensure a proper accounting of labor organization funds." 85 FR 13415. Union members cannot be expected to be interested in every minimal amount contributed by their labor organization to a fund.

Further, it is of little benefit to union members to review a T-1 form filed by their labor organization that *itself* contributed much less than $10,000 to the trust fund. If anything, such a report would cause confusion on the part of the public and would not serve the goal of transparency. That is because the T-1 form would not disclose how much the reporting labor organization contributed to the fund if the contribution was less than the $10,000 itemization threshold, causing confusion on the part of anyone reviewing the form as to whether the filing labor organization's contribution was $1 or $9,999. The form provides information about the *trust fund's* finances, but that information is of little relevance to a union member if the member belongs to a labor organization that made a *de minimis* contribution to the trust fund for which the report is filed.

For these reasons, the UBC objects to the imposition of the filing requirement on labor organizations as to trust funds without establishing a *de minimis* threshold for the amount that the particular labor organization contributed if it does not also meet the managerial dominance test. Although the UBC believes labor organizations should not be required to file the Form T-1, if such a form is required, there should be a *de minimis* threshold, and in the form the reporting labor organization should be asked to indicate how much it itself contributed to the trust fund, so that members of that particular labor organization are on notice as to how much of an interest, if any, they should take in that particular fund. The 2020 Form T-1 rule does not address why there is a lack of transparency on the form regarding the amount contributed by the reporting labor organization in situations where the contribution is less than $10,000, if one of the goals of the 2020 Form T-1 rule was to create transparency.

D. The "In Combination With" Test Does not Screen for Labor Organizations That Exercise Dominion Over a Trust Fund

Clearly the goal behind the management dominance/financial dominance test that triggers the reporting requirement is to screen for labor organizations that exercise control over a fund, and to require only those labor organizations to file the proposed form. However, the "in combination with other labor organizations" test, if met, would not actually evidence control because that term does not mean that the various labor organizations act in concert with one another or that they contribute any significant sum of money.

The Notice of Proposed Rulemaking stated that "[i]n some situations, the Department expects that labor organizations will have to contact the trusts to obtain information about whether the trust's 'pooled receipts' from labor organizations constitute a majority of the trust's receipts during a reporting period. Such 'pooled receipts' would include the total annual receipts of the trust, as the Department defines that term for purposes of the Form LM-2." 84 FR 25137. From this statement, it is clear that the OLMS did not expect a labor organization to always know which other labor organizations, if any, contributed into the fund, meaning that a labor organization would not need to have an agreement or understanding with other labor organizations that they too will contribute into the trust fund. The "in combination with" test therefore simply means in the aggregate, not "in concert with."

Simply because various labor organizations, acting independently, contributed into a trust fund, does not mean that any given contributing labor organization actually exercises control over a fund. Likewise, simply because the majority of the members of the trust's governing board are selected or appointed by labor organizations that did not act in concert in selecting or appointing the members of the governing board does not mean that any given labor organization exercises control over the fund. The 2020 Form T-1 rule, therefore, does not help to ascertain which labor organizations exercise control over the fund, such that they should be required to file a form regarding the fund. Simply because it is possible for labor organizations to act in concert to maliciously divert money to various funds, 85 FR 13423, does not mean that all labor organizations contributing even a minimal amount to a fund should all submit a Form T-1 with respect to such a fund.

E. No Minimum Dollar Amount for the Trust Fund to Trigger the Reporting Requirement

The UBC also believes that it does not advance the interests of democracy and transparency to require labor organizations to report on every fund that meets the requirements, no matter how small, particularly when such funds will not have any disbursements or receipts in the amount of $10,000 or more to itemize. For instance, labor organizations may have separate funds set up to cover a part of members' funeral expenses that do not have large sums of money in them.

The UBC believes that, if any form at all is required, a threshold based on the amount of assets in a Section 3(l) trust, specifically, $10,000, should be established for Form T-1 filing purposes. This would help ensure that the administrative burden does not outweigh the value of disclosure and that only trusts with substantial sums of money are required to be reported on a Form T-1.

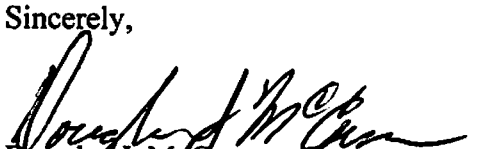
II. Confidential Information is not Adequately Protected if an Audit is Filed

The instructions for the Form T-1 state that "[a]n abbreviated report may be filed for any covered trust or trust fund for which an independent audit had been conducted, in accordance with the standards (as adopted from 29 CFR 2520.103-1)[.]" 85 FR 13450. Specifically, the labor organization may complete only items 1 through 15, 26, and 27 if it chooses the audit option and a copy of the audit is filed with the Form T-1.

It appears that the audit exemption does not contain an exception for the itemization requirement for confidential information that would be protected by 29 CFR § 403.8. The instructions to the form spell out "special procedures for reporting confidential information," which instructions are for the purpose of protecting confidential information, but those instructions appear to apply only to schedules 1 and 2, i.e., the itemized receipts and disbursements. 85 FR 13458-13460. It therefore appears that a labor organization that chooses the audit option will not be able to protect confidential information that would have been protected had it completed schedules 1 and 2. As a result, labor organizations may still be burdened with filling out all portions of Form T-1, particularly when itemization is not generally included in audits that are already prepared for funds. Thus, if any form is required, the audit exemption should allow the reporting labor organization to protect the confidential information that would be protected by 29 CFR § 403.8.

In conclusion, although the UBC believes the Form T-1 should be rescinded, as it does not help satisfy the goal of transparency about the reporting labor organization, at the very least the rule should be modified in light of the issues with the rule outlined above.

Sincerely,



Douglas J. McCarron
General President