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OFFICE OF LABOR-MANAGEMENT STANDARDS

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Financial Reports for
Trust in Which a Labor Organization
is Interested, Form T-1

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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. 84 FR 25130 (May 30, 2019). The proposal would implement a requirement of Form T-1 reporting on trusts that nine years ago the Department concluded was "overly broad and . . . not necessary." 75 FR 74936, 74936 (Dec. 1, 2010). *See also id.* at 74938-41. We respectfully suggest that the conclusion reached by the Department in 2010 was correct. But since the Department's stated basis for reaching that conclusion in 2010 has been completely ignored in the current notice of proposed rulemaking, we see no use in repeating those points here. *See* 84 FR at 25133 (citing but not discussing the Department's 2010 conclusion). Instead, we will address three particular aspects of the proposed rule, about two of which the Department specifically requested comments.

A. Retention of the Form 5500 Exemption.

The proposed rule provides that "[n]o Form T-1 need be filed for any trust that is an employee benefit plan that files a Form 5500, under the Employee

Retirement Security Act of 1974 for a plan year ending during the reporting period of the labor organization." 84 FR at 25157. The proposed rule further provides that "[f]iling the Form 5500-SF if not included within this exemption unless the plan is required to file an annual form with the Employee Benefits Security Administration (EBSA)." *Ibid.* The notice of proposed rulemaking "asks for comment on whether to retain such Form T-1 exemptions tied to ERISA." *Id.* at 25139. We submit that the Department should retain the Forms 5500 exemption in the proposed form.

From the outset, the various Form T-1 reporting rules have contained an exception for "employee benefit plans filing a complete and timely report under ERISA." 68 FR 58374, 58413 (Oct. 9, 2003). "The Department's determination, expressed in . . . the 2003 rule, that no union need file the Form T-1 if the trust already files a detailed ERISA report (Form 5500)" rested on the premise that " the LMRDA's reporting requirements would be satisfied by the submission of the detailed report filed by an ERISA-covered trust." 71 FR 57716, 57720 & 57721 (Sept. 29, 2006). This premise is consistent with the understanding that "the Form T-1 fills the information gap confronted by union members who, absent the rule, would be unable to obtain information about a trust comparable to that disclosed by the Form 5500." 71 FR at 57721. "The purpose of limiting the [Form T-1] filing requirements [where the trust files a Form 5500] is to minimize any overlapping reporting obligations . . . where such reports are publicly available and provide information roughly comparable to that required by the Form T-1," 84 FR at 25138-39.

As the Department noted during the 2008 Form T-1 rulemaking, when it proposed eliminating this exception but ultimately decided to retain it, "exempting labor organizations from filing a Form T-1 for those trusts required to file the Form 5500" allowed "the Department [to] substantially reduce[] the burden associated with this aspect of the rule." 73 FR 57412, 57422 (Oct. 2, 2008). The Department's burden estimates from 2008 indicate that eliminating the Form 5500 exemption would substantially increase both the number of trusts subject to Form T-1 reporting and the complexity of the reports filed with respect to such trusts. 73 FR at 57435.

The 2008 final rule limited the Form 5500 exemption to trusts that were "required to file a Form 5500." 73 FR at 57457. By contrast, the current proposal, like the 2003 and 2006 final rules, extends the Form 5500 exemption to any trust that files a complete and timely Form 5500 report. *Compare* 84 FR at 25157 *with* 71 FR at 57746. The reason given in 2008 for limiting the exemption to trusts that were required to file was that it might be difficult to predict whether a trust that has the choice of whether to file a Form 5500 report will actually do so in any particular year. 73 FR at 57429-30. However, it should be no more difficult for a union to determine whether a trust will be filing a Form 5500 report than to extract from the trust the financial information that otherwise would be needed to file a Form T-1 report. We submit that the Department correctly concluded in 2003 and 2006 that speculation about possible difficulties in determining which trusts actually file a Form 5500 was an inadequate reason for requiring duplicative

reporting with respect to trusts that actually file Form 5500 reports.

In sum, the Department should include the Form 5500 exemption as formulated in the proposed rule, just as it did in 2003 and 2006.

B. Express Exemption of Credit Unions.

The notice "requests comment on whether [the Department] should exempt financial institutions affiliated with labor organizations, such as credit unions, from the final rule." 84 FR at 25139. We submit that the Department should include an express exemption for union-affiliated credit unions from Form T-1 reporting.

From the outset, Form T-1 rulemaking has proceeded on the unexamined assumption that credit unions might be included among the reportable union-related trusts. While some credit unions might have met the reporting thresholds under the 2003 rule, the new thresholds introduced by the 2006 rule – and continued in every rule thereafter – make it extremely unlikely that any credit union would be covered. In order to comply with the decision in *AFL-CIO v. Chao*, 409 F.3d 377 (D.C. Cir. 2005), the 2006 rule limited Form T-1 reporting to situations where the reporting union "alone or in combination with other unions, selects or appoints the majority of the members of the trust's governing board or it contributes, alone or in combination with other unions, more than 50% of the trust's revenue during the annual reporting period." 71 FR at 57717. Those thresholds have been maintained in the 2008 rule and in the current proposal. The governing board of a credit union must be selected by the members and not by any sponsoring labor organization. *See* 12 U.S.C. § 1761(a). And, the credit union's revenue will

come largely from the deposits of individual members. Thus, the only time Form T-1 reporting on a credit union would be required is in the extremely unlikely circumstance where a majority of deposits come from labor organizations rather than from individual depositors.

In the unlikely event that some credit unions did meet the thresholds for Form T-1 reporting, "the Federal Credit Union Act, 12 U.S.C. 1751, as well as other laws and regulations" governing credit unions, 84 FR at 25139, would make the reporting called for by the Form T-1 both unnecessary and legally impossible.

The utility of requiring Form T-1 reporting on union-related credit unions has never been explained beyond a single example of possibly improper lending practices given in the Department's first Form T-1 proposal:

> "A third case illustrates the current barriers to disclosure: one union local accounted for 97% of the funds on deposit at a credit union; membership in the credit union was limited to members of the Local and two other union locals, and all of the credit union directors were Local officials and employees. The credit union made large loans, many near $20,000, to union officials, employees and their family members. Four loan officers, three of whom were officers of the Local, received 61% of the credit union's loans. Union members did not have ready access to information about these loans because the Local did not wholly own the credit union." 67 FR 79280, 79283 (Dec. 27, 2002).

Later discussion of Form T-1 reporting on credit unions took the form of cursory repetitions of this single example. 71 FR at 57720; 73 FR 11754, 11759 (March 4,

2008); 73 FR at 57415. The apparent point was to suggest that filing a Form T-1 report about the credit union in question would have provided union members with "information about the[] loans." 67 FR at 79283.

The loans described in the example are characterized by the National Credit Union Administration as "loans to insiders" and, as such, are subject to special review by NCUA examiners. NCUA Examiner's Guide, App. 10A, p. 10A-1.[1] The NCUA Examiner's Guide directs the examiners to apply rigorous "[r]eview procedures for insider loans" to ensure that the loans "comply with § 107(5) of the [Federal Credit Union] Act, § 701.21 of the NCUA Rules and Regulations, the FCU Bylaws, and sound principles of internal control." *Ibid.*

Perhaps more directly to the point, "information about the[] loans," 67 FR at 79283, would be among the "personally identifiable financial information," 15 U.S.C. § 6809 (4)(A), that all credit unions – not just those that are federally insured – are forbidden to publicly disclose under the Gramm-Leach-Bliley Act. *See* 15 U.S.C. § 6802. *See also* 12 CFR Part 106 ("Privacy of Consumer Financial Information"). The applicable privacy regulations forbid a credit union from providing loan information to a union without first giving the borrower an opportunity to prevent such disclosure. 12 CFR § 1016.10(a)(1). And, in the unlikely event that a borrower did allow loan information to be passed along to the union, the regulations forbid the union from publicly disclosing that information. 12 CFR § 1016.11(b)(1). In short, Form T-1 reporting on credit union loans would be

[1] Available at: https://www.ncua.gov/regulation-supervision/manuals-guides/examiners-guide.

unlawful under the statutes and regulations directly covering credit unions.

Against that background, it would seem to go without saying that Form T-1 reporting on the financial transaction of credit union members or borrowers is not contemplated by the proposed rule. Nevertheless, "a credit union that provides loans to labor organization members" continues to be given in the proposed Form T-1 instructions as an example of a reported-on trust, 84 FR at 25162, as it has in past iterations, 73 FR at 57464, 71 FR at 57752. By creating the impression that private financial dealings with credit unions might be subject to public disclosure, the Form T-1 proposals tend to discourage the use of credit unions. This runs directly contrary to the federal policy of fostering the formation of credit unions "for the purpose of promoting thrift among [their] members and creating a source of credit for provident or productive purposes." 12 U.S.C. § 1752(1). To avoid that result, the instructions to the Form T-1 should be amended to expressly state that union-related credit unions are not subject to reporting.

C. Clarify the Itemization Exemption for Receipts Provided Pursuant to a Collective Bargaining Agreement.

The 2008 Form T-1 rule introduced an exemption from itemized reporting on Schedule 1 for "receipts derived from pension, health, or other benefit contributions that are provided pursuant to a collective bargaining agreement." 73 FR at 57466. The preamble to the 2008 final rule explained that this exemption addressed the "concern that reporting of employer contributions to trusts could reveal the extent of its business operations to competitors and unnecessarily affect its business." *Id.* at

57425.

Consistent with the exemption's stated purpose, the preamble to the 2008 final rule also stated that the "final rule excepts from the itemization requirement any receipts by a trust made pursuant to a collective bargaining agreement" when the reporting union utilizes the "the audit exemption." 73 FR at 57428. However, the instructions to the 2008 Form T-1 expressly applied the itemization exemption only to figures reported "on Schedule 1." *Id.* at 57466. The apparent intent was to apply the itemization exemption to figures reported "on Schedule 1" or on an audit filed in lieu of Schedule 1.

The current proposal contains the same ambiguity. 84 FR at 25164. The Department should clarify that the exemption applies to both Schedule 1 and to an audit attached in lieu of Schedule 1.

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