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Division of Interpretations and Standards
Office of Labor-Management Standards
Department of Labor
200 Constitution Avenue, NW, Room N-1519
Washington, DC 20210

Re: Comments on Proposed Rulemaking – Form T-1 (RIN 1245-AA09)

To Whom It May Concern:

The United Food and Commercial Workers International Union ("UFCW") submits the following comment ("Comment") concerning the Department of Labor's ("DOL") Notice of Proposed Rulemaking ("NPRM") re-establishing a Form T-1 reporting requirement for labor organizations. This Comment follows and expands upon the comments previously submitted by UFCW to the Office of Management and Budget ("OMB") regarding the Form T-1's compliance with the Paperwork Reduction Act of 1995.

UFCW is a labor organization which represents working men and women across the United States. UFCW's 1.3 million members work in a range of industries, with the majority working in retail food, meat packing and poultry, food processing and manufacturing, and retail stores. We are North America's neighborhood union, and the largest union of young workers with 40% of UFCW members under the age of 30. UFCW members are from many backgrounds and walks of life but come together as UFCW for the shared goal of achieving the American dream. UFCW is about workers helping workers improve working and living standards through better wages, benefits, and working conditions. Accordingly, UFCW has a strong interest in ensuring that member resources are spent for their benefit and improving members' lives. In addition to pension benefits and health and welfare benefits, a number of UFCW members receive other employee benefits, such as severance and training benefits, through single employer and multiemployer benefit funds and derive substantial benefits from joint labor-management committee trust funds. In many instances, the funds are administered by a joint board of trustees pursuant to Section 302(c)(5) of the Labor Management Relations Act ("LMRA") or, in the case of certain single employer plans, by the sponsoring employer or a representative administrative body appointed by that employer.

As discussed below, the UFCW respectfully disputes the need for a T-1 filing, particularly in the case of trusts that already are required to file existing government forms, such as a Form 990 with the Internal Revenue Service ("IRS"). Moreover, the Employee Retirement Income Security Act ("ERISA") and LMRA both provide a deep regulatory framework and enforcement mechanism to root out the potential for abuse described in the preamble to the T-1 regulation. As noted in the UFCW's previously submitted comment to OMB, UFCW believes that the NPRM significantly underestimates the costs to labor organizations of complying with the rule and therefore, the benefits, if any, associated with the additional information requested to be produced are far outweighed by these costs.[1] The proposed Form T-1 is duplicative of existing reporting requirements, places unnecessary burdens on labor organizations, and is incompatible with existing recordkeeping and reporting practices. In addition, as a result of the additional expense and administrative difficulties the Form T-1 will impose on labor organizations and covered trusts, the cost of the proposed Form T-1 ultimately will be borne by the very individuals the Form is claimed to protect—union members.

[1] Agencies must certify that a proposed collection of information, among others, (a) is necessary for the proper performance of the functions of the agency, including that the information to be collected will have practical utility; (b) is not unnecessarily duplicative of information otherwise reasonably accessible to the agency; (c) reduces to the extent practicable and appropriate the burden on persons who shall provide information to or for the agency (d) is written using plain, coherent, and unambiguous terminology and is understandable to those who are to respond; and (e) is to be implemented in ways consistent and compatible, to the maximum extent practicable, with the existing reporting and recordkeeping practices of those who are to respond. 5 C.F.R. § 1320.9.

1. The NPRM Mischaracterizes Union "Control" over Covered Trusts

The proposed Form T-1 would require reporting by a labor organization on each trust for which the organization, alone or with other labor organizations, either appoints a majority of the trust's governing body or makes more than 50% of the trust's contributions during a year, and treats contributions made on behalf of the labor organization's members by an employer pursuant to a collective bargaining agreement as contributions by the labor organization. This imputation to the labor organization of control over trusts established under the collective bargaining process does not reflect union domination over a trust fund and is incorrect as a matter of law. The trusts subject to the T-1 reporting are trusts established pursuant to collective bargaining and are subject to the requirements of the LMRA, which among other things prohibits the transfer of employer money to a union. Rather, employer assets must be held in a jointly managed trust, over which neither the union nor the employer has majority control. While *AFL-CIO v. Chao,* 409 F.3d 377, 389-391 (D.C. Cir. 2005), acknowledged that Section 208 of LMRDA is satisfied where the reporting requirement applies to trusts in which "unions retain a controlling management role." [emphasis added], it did not modify the organizational restrictions on Taft-Hartley trusts contained in the LMRA. The conflation of Taft-Hartley trusts with union domination, then, misses the purpose of the LMRA, which explicitly forbids unions from exercising majority control over the employers assets that make up such trusts.

2. Statutory Protections Already Exist That Shield the Trust Funds from the Concerned Abuse

The trusts for which labor organizations must obtain information are operated with joint boards of trustees consisting of equal numbers of union and management representatives. This governance requirement is necessary to comply with the requirements of Section 302(c)(5) of the LMRA which requires such equal representation with respect to money or other things of value paid to a trust fund established pursuant to collective bargaining. Importantly, each trust established under Section 302(c)(5) must operate for the sole and exclusive benefit of the employees of each employer and their families and dependents. As noted above, the joint board requirement of LMRA ensures that assets held by a benefit trust are not subject to union domination and that employers have an equal role in managing the operation of the trust. Thus, the organizational requirements of LMRA operate just as they were designed to, as a check on union domination over the assets of trusts that benefit union members.

Similarly, to the extent that the trust is subject to the requirements of Title I of ERISA, particularly in the case of training and apprenticeship funds, a joint board of trustees

> [M]ust act for the exclusive purpose of (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances and prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like gains.

See Section 404(a)(1) of ERISA. Further, Section 406 of ERISA prohibits transactions between the plan and any party in interest, except where a specific exemption applies, and transactions that involve self-dealing between the plan and a plan fiduciary. The ERISA definition of "party in interest" is extremely broad, and includes plan participants, service providers, contributing employers, and related labor organizations. Any prohibited transactions committed in connection with a plan are subject to an excise tax. These multiple existing requirements on benefit plans already provide a safeguard against potential abuses involving the vast majority of covered trusts.

Courts have consistently recognized that, even in the context of trusts jointly administered by labor and employer appointees, a trustee bears a duty of complete loyalty to the beneficiary of the trust, to the exclusion of the interests of all other parties, and is therefore not a representative of the settlor organization that appoints them while they act as a trustee. See *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329. This is equally true of employer-appointed trustees as it is of the trustees appointed by a labor organization. Consequently, every member of a joint board of trustees is required by principles of trust law and ERISA to prioritize the interests of the trust and its beneficiaries over other entities, even the organization that appointed them.

Thus, there are multiple statutory provisions that require a joint board of trustees to determine whether it is in the best interest of the participants and beneficiaries (including family members and dependents covered under the trust) to go through the exercise of producing the extensive documentation required by a separate entity, here a labor organization, to complete the T-1 reporting form. The DOL states that it "expects that labor organizations that do not already possess the information to determine whether they need to file a Form T-1 will be able to obtain this information simply by contacting the trust." However, because the T-1 is a reporting form required of a separate legal entity with no legal right to receive this information, in order to satisfy the requirements of Section 302(c)(5) of the LMRA and Section 404(a)(1) of ERISA, the underlying trust would, at a minimum, be required to charge the labor organization for providing the necessary information, and in reality would almost certainly charge <u>all costs</u> associated with providing the information needed to complete the T-1 directly to the labor organization on a dollar-for-dollar basis. Indeed, as a matter of corporate governance, the joint board of trustees must decide whether the expenditure of resources required to provide the detailed information needed by labor organizations to complete the T-1 is in the best interests of participants of the trusts, and their families and dependents.

3. The NPRM Underestimates the Burden the Additional Reporting Will Impose on Covered Trusts and Labor Organizations

Additionally, there is nothing to suggest that covered trusts will take the necessary steps to change their accounting systems, because they are in fact under no legal obligation to do so. To the extent trusts do take the required steps to ensure compliance with the rule, the labor organization will have to shoulder the cost of additional hardware, software, staffing and other needs. If the underlying trust does not pass along all costs associated with compiling and reviewing the underlying information, the trust's board of trustees runs the risk of not acting in the participants' and beneficiaries' best interests and violating their fiduciary duties by expending resources for the benefit of the labor organization. They further risk engaging in a prohibited transaction by expending resources on behalf of a party in interest—the union—for which they may be subject to an excise tax.

The costs incurred by each trust subject to reporting will include not only staff time incurred by employees and administrators for each trust, but also legal and accounting fees for reviewing and verifying the information charged to each trust. The NPRM explains that, in some situations, the DOL expects 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 DOL defines that term for purposes of the Form LM-2. The NPRM assumes that determining whether a labor organization has financial dominance and providing the necessary information will be a straightforward matter. However, again, the labor organization has no ability to compel the information needed to even determine whether a T-1 is required to be filed, and the fact that the rule creates a wholly new definition of financial dominance and control does not legally make it so. Thus, there will certainly be added costs to even determine whether filing is even necessary. None of these significant expenditures of time and resources is accurately reflected in the OMB cost estimates. Thus, the NPRM significantly underestimates the total amount of time and costs of complying with the Form T-1 and the associated expenses imposed on each labor organization.

The NPRM makes several assumptions in its description of the reporting process under the proposed Form T-1, all of which underestimate the true burden that the Form T-1 will place on labor organizations. As an initial matter, even those labor organizations that may not ultimately be required to file a Form T-1 will incur expense, because they will need to engage legal and accounting service providers to determine whether a filing is necessary. Therefore, the assumption that only those labor organizations that ultimately meet the financial or managerial domination test will be impacted is incorrect. Next, as noted above, covered trusts are legally constrained from providing the detailed information to labor organizations without charge. Further, given the type of information that has to be separately reported, it is doubtful that the information provided will be available in a format that will enable the organization to successfully complete the form in a timely manner, and the internal process of completing and filing the form will not be a relatively straightforward administrative matter. In reality, there is no mechanism for the labor organization that shoulders the reporting obligation to compel the covered trust to provide the necessary information or to verify that the information provided is accurate and complete without paying whatever the trust determines is an appropriate charge.

The NPRM notes that several commenters on the 2006 Proposed T-1 Rule expressed concern that a section 3(l) trust could refuse to provide the information needed to complete the Form, but largely dismisses this concern, reasoning that "the possibility of such intransigence appears remote" given the relationship between labor organizations and the trusts in which they participate. Contrary to the rule, labor organizations do not maintain management control or domination over the trusts covered by the proposed T-1. In the case of a trust under Section 302(c)(5) of LMRA, the trust must be managed by a joint board of trustees, half of whom are not controlled by the labor organization, and the assets must be used solely in the interest of participants and beneficiaries. This obligation extends to all of the trustees, including the labor-appointed trustees. In short, trusts and their trustees take on a different set of obligations in their capacity as trustees and are not obligated in any way to serve the interests of any settlor organization. Rather, they are required by law, including the LMRA and ERISA, where applicable, to act exclusively in the interest of participants. Trustees of covered trusts that receive requests for detailed financial information will be faced with the very real legal problem of determining whether and how to comply with such requests while at the same time satisfying their legal obligations as trustees.

Each trust fund will likely require an agreement from each labor organization that the labor organization will repay the trust for all costs associated with producing the information necessary to complete the T-1. In that regard, not all information requested on the T-1 or an audited financial statement will be available from the trust's annual financial statements or Form 990, and such additional information would have to be separately audited and reviewed by the trust's professionals. Therefore, the information requested of each trust likely would not be provided and verified at the hourly rate of internal fund office employees of the trust. In many instances, the administration of the trusts subject to reporting on the T-1 will require additional work by providers outside the trust and will be outsourced to a third-party administrator or other record-keeper, for which greater hourly charges may apply. Additionally, as noted above, this information would have to be reviewed by each trust's accounting firm, which would charge rates far in excess of the hourly charges reflected in the proposed rule. The estimated cost in the NPRM of $8,222.28 for each T-1 filer to complete a T-1 includes only the covered labor organizations. It completely ignores the costs for affected trusts to provide the necessary information, and does not reflect in any way the true charges that will be passed along to the labor organizations responsible for the T-1 filing. Finally, this estimate appears to include only the regular T-1, and does not take into account the additional time and expense that will be required to produce the terminal T-1 required under proposed Section 403.5. For these reasons, it is clear that the NRPM estimate materially understates the true burden the T-1 will place on labor organizations and trusts.

Likewise, the regulatory flexibility analysis in the NPRM considers only the impact on covered labor organizations, and does not consider the impact on the affected trusts. As noted above, the complex financial reporting requirements will require a great deal of time and expense for covered trusts, both by trust personnel and by outside administrative, accounting, and legal staff. Again, this additional expense to the trusts ultimately will be borne by the labor organization and by the members whom the T-1 is intended to benefit.

The costs to the labor organizations will not be mitigated by the proposed partial exception to the T-1 filing, permitting labor organizations to provide an independent audit of the trust fund in lieu of a completed form. First, depending on the respective fiscal years of the underlying trust and labor organization, this exception may be of little use in reducing costs. For example, in situations where the trust's fiscal year and labor organization's fiscal year coincide or are separated by only several months, the audit would have to be prepared within 90 days after the close of the labor organization's fiscal year when the trust's audit may not be close to completion. The Form 990 is due five and a half months after the close of the trust's fiscal year, and in practice most trusts require an additional six-month extension to complete the complex financial and organizational reporting. Thus, contrary to the assumption in the NPRM that information will be readily available at the conclusion of the trust's fiscal year, in many instances, in order for the labor organization to timely file the T-1, the trust will have to prepare a special audit expressly for the labor organization. Even if the impacted trust does not prepare a special audit, the trust's record-keeper and auditor still would have to review the information provided to the labor organization on an accelerated timetable increasing the costs to the labor organization. In order to avoid the significant burdens associated with having to prepare a special audit to comply with the regulations' deadlines, the regulations should, at a minimum, allow labor organizations to rely on a trust's most recently prepared audited financial statement for the prior year in order to take advantage of the regulations' partial exemption.

Further, the exception for local unions, where reporting may be completed by a parent organization, will not necessarily provide meaningful relief from duplicative and overlapping reporting requirements. Because the proposed rule does not include a *de minimis* exception, in cases where a parent organization does not participate in a trust, a small union that meets the overall receipts test but makes only a negligible contribution to the overall trust will be subject to burdensome reporting requirements, and as noted above, will have limited ability to obtain the needed information from the trust. In most instances, the parent organization will incur no reporting obligation because it is not a party to a collective bargaining agreement requiring contributions to the trust. The reality is that in many cases, it is smaller labor organizations that will be required to expend the significant resources necessary to comply with the proposed T-1.

Because of the dynamics of collective bargaining among different groups and jurisdictions, it will not be uncommon for a modest-sized local union to be required to file multiple Forms T-1. Further, in cases where multiple organizations contribute to the same trust, because there is no *de minimis* exception under the Form T-1, any organization that contributes a dollar to the trust will be subject to the reporting requirement. A trust with multiple unions or multiple local subsidiaries of the same union participating may not keep records of the contributions by union or local, and may have no way other than manual review to provide that information. The resulting administrative burdens associated with implementing the Form T-1 will be significantly greater than is described in the NPRM. In addition, as noted above, the true cost of filing will include not only administrative work, but professional fees for accountants and attorneys as well, adding up to a total cost well in excess of the amounts estimated in the NPRM. In order for all of the information to be reported, these burdens are imposed not only upon the local unions that have to file the T-1 but also upon the trust funds that must compile the information. Therefore, to comply with the regulatory procedures, the Department should, at a minimum, revise its estimate of overall costs that it has assumed will be incurred by not only affected labor organizations but trust funds in complying with this proposed rule.

The proposed rule is based on the incorrect premise that the work required by the underlying trust funds to prepare the information needed in order for labor organizations to file the T-1 will not be material. In fact, there almost certainly will be considerable annual recurring charges incurred by each trust, which the trust will be required to pass on to the filing labor organization. The analysis in the NPRM also seems to rely on the fact that labor unions are already using e.LORS-compliant accounting systems, but fails to consider the reality that covered trusts may not use such systems, and provides no quantitative data on the time and expense required for trusts to upgrade their systems for e.LORS compliance and to provide the necessary data to labor organizations. Likewise, the NPRM advises that OLMS will update the e.LORS system to allow labor organizations to file Form T-1 as they file the Form LM-2, but does not assess the cost of making these software revisions or the cost of staffing a help desk to assist filers as promised elsewhere in the NPRM. As a result, the proposed rule materially understates the true cost of compliance with the T-1 for both labor organizations and covered trusts.

The information being requested does not belong to the labor organization and there is no obligation by the independently operated trust fund to provide this information without passing along the costs completely. Thus, the added burden on the labor organizations and ultimately the membership will be substantial relative to the benefits to the labor organization's membership of obtaining this information.

Therefore, to comply with the regulatory procedures for NPRM, we request that a revised estimate of overall costs be prepared that will be incurred not only by affected labor organizations, but also by trust funds, which will be passed along to the labor organizations in complying with this proposed rule.

4. The Form T-1 is Duplicative of Existing Reporting Requirements

The proposed Form T-1 requires a separate filing by each labor organization with receipts of $250,000 or more with respect to each trust in which the labor organization is "interested," meaning the trust provides benefits to members of the labor organization and the labor organization, alone or with other labor organizations, either appoints a majority of the trust's governing body or makes more than 50% of the trust's contributions during a year. Contributions made on behalf of the labor organization's members by an employer pursuant to a collective bargaining agreement are considered contributions by the labor organization. Trusts that file a Form 5500 with the Employee Benefit Security Administration, including ERISA-covered pension and welfare plans that are required to file Form 5500 as well as other funds such as apprenticeship and training funds that may file a Form 5500 voluntarily, are exempt from completing the Form T-1. In that regard, the notice of proposed rulemaking also asks for comment on whether to retain this exemption. UFCW urges the Department to retain the Form 5500 exemption to minimize the reporting burdens described herein and what would certainly be overlapping reporting obligations for trusts and labor organizations.

However, despite the Form 5500 exception, the proposed Form T-1 still would impose significant reporting requirements on many trusts that already provide extensive financial information to the federal government and the public. Training, apprenticeship, severance, and joint labor-management committee trusts typically are organized as separate tax-exempt organizations under Sections 501(c)(3), 501(c)(5), or 501(c)(9) of the Internal Revenue Code. As a result, these organizations are not exempt from filing returns with the federal government, and continue to be subject to reporting to the IRS, which requires detailed information on each trust's revenue, expenses and governance. For example, gathering this information and completing a Form 990 each year entails significant expense for covered trusts, which already engage accountants to prepare forms on behalf of these distinct legal entities. The imposition of an additional reporting requirement, then, does not become less duplicative simply because the form will be filed with a different agency, or because the reporting obligation will technically apply to a different entity. Rather, the overall burden on labor organizations and related trusts will increase significantly as a result of the reporting required for the Form T-1, in many cases on an accelerated timetable.

5. Line 11 on the Form is Inconsistent with the Instructions

Finally, on a technical note, there appears to be an error on Line 11 of the Form. Specifically, this line requests the "tax status of the trust," but the corresponding instruction refers to the "trust employer identification number." In addition to creating confusion for filers, this error raises the question of which set of information was considered when formulating the burden analysis. Listing a trust's EIN is a fairly straightforward matter, while determining each trust's tax status may require a more intensive process, particularly since as with much of the information required on the Form T-1 the labor organization will need to request such information from the trust. The Department should clarify what information is required on Line 11 and reevaluate the estimated reporting burden accordingly.

The UFCW appreciates the opportunity to comment on the proposed T-1 regulations and highlight the burden imposed on both labor organizations and trust funds to comply with the regulations' requirements. Should you have any questions concerning this matter or require additional information related to the NPRM, please contact the undersigned.

Respectfully submitted,

Peter J. Ford

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