International
Union of Bricklayers
and Allied Craftworkers

Office of the Secretary-Treasurer

July 29, 2019

Andrew Davis
Chief of the Division of Interpretations and Standards
Office of Labor-Management Standards
U.S. Department of Labor
200 Constitution Avenue NW, Room N-5609
Washington, DC 20210

VIA Federal eRulemaking Portal: www.regulations.gov

Re: Labor Organization Annual Financial Reports for Trusts in which a Labor Organization is Interested, Form T-1

Mr. Davis,

Please accept these comments submitted by the International Union of Bricklayers and Allied Craftworkers, AFL-CIO ("BAC") in response to the U.S. Department of Labor's Office of Labor-Management Standards ("DOL" or the "Department") proposed rule "Labor Organization Annual Financial Reports for Trusts in which a Labor Organization is Interested, Form T-1." 84 Fed. Reg. 25130 (May 30, 2019). BAC is the oldest continuously operating union in the United States and represents nearly 80,000 members working in the masonry industry. On behalf of those members and our affiliate unions across the country, we write to oppose the Proposed Rule and to raise specific concerns about portions thereof.

The Proposed Rule exceeds the Department's authority under section 208 of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. § 438, because it is not necessary to prevent the circumvention or evasion of reporting requirements under Title II of the LMRDA. Like the prior version of Form T-1 reporting that was vacated by the D.C. Circuit Court, the Proposed Rule requires detailed financial reporting regarding independent entities which the reporting union neither dominates nor controls. First, the proposed rule wrongly treats employer contributions as a measure of union financial domination. Second, it wrongly imposes obligations on

the reporting union based on indicia of control by another labor organization or labor organizations. Should DOL nonetheless proceed to issue a final rule, for the reasons stated below it should retain the 5500 exemption and clarify the audit requirement.

DOL Has Not Demonstrated that Broad T-1 Reporting is "Necessary to Prevent the Circumvention or Evasion of" Title II Reporting Requirements

Section 208 of the LMRDA gives the Department authority to require reports concerning "trusts in which a labor organization is interested," but only to the extent that such reports are "necessary to prevent the circumvention or evasion of" Title II reporting requirements. 29 U.S.C. § 438. An earlier attempt by the Department to impose a broad T-1 reporting requirement was vacated by the D.C. Circuit in *AFL–CIO v. Chao*, 409 F.3d 377 (D.C. Cir. 2005) because that formulation "'reache[d] information unrelated to union reporting requirements and mandate[d] reporting on trusts even where there is no appearance that the union's contribution of funds to an independent organization could circumvent or evade union reporting requirements by, for example, permitting the union to maintain control of the funds." *Id.* at 389. In its current formulation, the Department is proposing to require a T-1 report for every trust that falls within Section 3(l) of the LMRDA if the reporting union "alone or in combination with other labor organizations, appoints or selects a majority of the members of the trust's governing board or where contributions by labor organizations, or pursuant to a collective bargaining agreement, represent greater than 50 percent of the revenue of the trust." (84 Fed. Reg. at 25148.) Though admittedly narrower than the formulation vacated by the D.C. Circuit, this disjunctive test likewise is broader than is "necessary to prevent the circumvention or evasion of" Title II reporting requirements.

Employer Contributions Do Not Indicate Union Control

DOL includes within the T-1's reach entities funded by collectively-bargained employer contributions, *i.e.*, jointly-trusteed Taft-Hartley trusts. DOL does not demonstrate, nor can it, how employer contributions to a Taft-Hartley trust can lead to union domination or managerial control of that entity merely because they are made "pursuant to a collective bargaining agreement." In contrast to the situation DOL posits in which a labor organization might evade a reporting obligation respecting its own finances by "simply transferring money from the labor organization's books to the trust's books" (84 Fed. Reg. at 25134), employer contributions to a Taft-Hartley trust are not and never were union assets. DOL fails to show how a union might circumvent or evade its reporting requirements by somehow managing to control the finances of a trust to which it does not contribute. *See AFL-CIO v. Chao,* at 389. As justification for requiring reporting of Taft-Hartley funds, DOL invokes a member's interest in "a proper accounting of how funds are invested or otherwise expended by the trust" *(id.* at 25134*)* and asserts that T-1 reporting related to Taft-Hartley trusts could "deter individuals who might be tempted to divert funds from the trusts" *(id.* at 25135). Those are important interests, and subject to vigorous enforcement under ERISA, but they are not subject to Title II reporting, so are unavailing with respect to this Proposed Rule.

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The Reporting Threshold Should Relate Solely to the Reporting Union

The test for deciding which trusts must be reported on Form T-1 is overbroad insofar as it looks to financial contributions or management control by unions other than the reporting union. The Proposed Rule requires reporting relating to trusts in which the reporting union is interested if the reporting union "alone or in combination with other labor organizations" controls the governance or where "contributions by labor organizations" or pursuant to a collective bargaining agreement, represent greater than 50 percent of the revenue of the trust." The Proposed Rule would therefore require a union to provide detailed financial reports regarding a trust to which it is merely a minor contributor if another union or unions together contribute (or even negotiate) more than half the total funding. Keep in mind that because the test is disjunctive, the T-1 would be required in that case even if the entity was not controlled by unions or even if the minority contributor was the only union at all to have a seat on the entity's governing board. DOL has not even argued, much less demonstrated how the minority contributor in that situation could use such a trust to evade Title II reporting requirements. Even if it could be argued that a T-1 is required where multiple unions jointly control *and* jointly fund a particular trust—the only situation DOL addresses in its rationale (84 Fed. Reg. at 25138), the Proposed Rule goes well beyond that scenario and reaches situations in which a reporting union's arguable "control" is far too attenuated to present a risk of evasion or circumvention. DOL asserts baldly "[i]f a single labor organization may circumvent its reporting obligations when it retains a controlling management role or financially dominates a trust, then a group of labor organizations may also be capable of doing so." (*Id.* at 25137). Not only is that an error in logic, it is vastly out of step with reality.

In the real world, some of our affiliated local unions participate in Taft-Harley benefit funds jointly with affiliates of other labor unions. In these instances, the union side of the Board of Trustees may consist of two unions which share control of the union seats equally and whose signatory employers contribute roughly equally to the trust, or it may be that the union-side of the Board is dominated by representatives of one union, with a minority of seats, or even a single seat, delegated to the other union. Even in the first case, we would argue that neither of the unions involved "controls" the management of the entity in any real sense—not just because the unions together represent only half the Board, but also because the unions cannot be assumed to, and in real life do not, act in lockstep or control each other. Certainly, in the second case, the minority union does not control the entity. The Proposed Rule as written—in the disjunctive and attributing all union interests to the reporting union—casts entirely too wide a net without any showing of the necessity that Section 208 requires.

OLMS Should Retain the Form 5500 Exemption

The Proposed Rule exempts a labor organization from filing a Form T-1 "for any trust that is an employee benefit plan that files a Form 5500" (84 Fed. Reg. 25157) and invites comments regarding whether to retain that proposed exemption. We submit that DOL should retain this exemption.

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Form 5500 contains a great deal of detailed information about employee benefit plans and the completed forms are publicly available from a number of sources. The Department of Labor notes that the purpose of exempting 5500-filers "is to minimize any overlapping reporting obligations that exist under certain other laws where such reports are publicly available and provide information roughly comparable to that required by the Form T–1." (84 Fed. Reg. at 25138-39.) Earlier iterations of this Proposed Rule also contained an exemption for trusts that file a Form 5500. The Department considered dropping the exemption in 2008, but ultimately concluded that requiring both the Form T-1 and Form 5500 would require duplicate reporting, redundant filing requirements, and increased burden on the funds. 73 Fed. Reg. 57412, 57430 (Oct. 2, 2008). These factors continue to be true and remain compelling reasons to retain this exemption.

DOL Should Clarify the Audit Exemption

The Proposed Rule states that DOL intends to accept an audit—so long as the audit contains the required information as described in the Form T-1 instructions—in lieu of a complete form T-1. This exemption would permit labor organizations to satisfy their obligation by completing the first page of Form T-1 and attaching a copy of a covered trust's audit. Such an audit must include "[a] statement of trust receipts and disbursements aggregated by general sources and applications, which must include the names of the parties with which the trust engaged in $10,000 or more of commerce and the total of the transactions with each party." 84 Fed. Reg. 25139. DOL should retain the overall audit exemption but drop the requirement for this itemization because it is unrelated to any business purpose of the trusts and would not ordinarily be tracked in that way.

In the alternative, DOL should allow the audit to omit specific itemization for trust receipts of collectively bargained employer contributions or for benefit payments to participants—the same exemptions it allows for the T-1 form itself (84 Fed. Reg. at 25164). There is no reason not to apply that exemption in the case of an audit as well as the Form itself, and there is every reason to do so. Revealing those amounts in specific detail would trample individual privacy rights and might allow an employer's competitors to glean confidential information about the employer's business practices, all while serving no Title II reporting purpose.

General Comments

The proposed Form T-1 will be costly and burdensome to complete; unmatched by any potential benefit to members of labor organizations. DOL estimates that, for each Form T-1 labor organizations file, they will expend 121.38 hours the first year and 84.12 hours each subsequent year. 84 Fed. Reg. at 25142. This figure is not for each labor organization, it is for each Form T-1. Labor organizations with multiple covered trusts—such as BAC—will spend hundreds of hours per year meeting this new requirement. That is a substantial burden to impose on labor organizations that already expend a

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great deal of resources complying with DOL reporting requirements, including the greatly expanded Form LM-2, with no resulting additional benefit to our members. In addition, although the Department glosses over this difficulty, for trusts a union does not control, detailed reporting may be impossible should a trust determine that it is not an appropriate use of resources to either track the information required on the Form T-1 or to provide this information to the reporting labor organization. The Department therefore should provide a safe harbor exemption for labor organizations that make good-faith, but ultimately unsuccessful, efforts to obtain the information required to complete the Form T-1.

Respectfully submitted,

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Secretary-Treasurer

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