July 27, 2019
Submitted Via Email

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

Dear Mr. Davis: Re RIN 1245-AA09

WithumSmith+Brown is a national CPA firm with over 1,400 employees and offices in many major cities on the east coast. Our firm services clients spanning nearly every industry; among those clients are labor organizations and employee benefit plans located throughout the United States. We write in response to the Department of Labor's notice of proposed rulemaking. (84 FR 25130 dated May 30, 2019) This proposal would require that labor organizations file an annual report on certain trusts in which they have an interest. (84 FR 25133) The current proposal is similar to, but not identical to, a previous proposal for Form T-1 from 2008 that would have required like reporting.

Form 5500 Exemption

The proposal includes an exemption from filing for employee benefit plans covered by ERISA that file Form 5500. The proposal seeks comments on whether this exemption should be maintained. (84 FR 25139) We write in support of this exemption because the information provided in the annual report of an employee benefit plan (Form 5500) is substantial. OLMS has agreed with this conclusion many times in considering this and similar proposals. Although the information provided in Form 5500 is not identical, the information is similar to the information required to be provided on proposed Form T-1; and in the case of payments to service providers' more robust because the reporting threshold is $5,000 on Form 5500 vs the proposed $10,000 in Form T-1. Further, the Form 5500 requires the reporting of indirect compensation in addition to direct compensation paid to a service provider whereas the proposal reports only direct compensation. Finally, employee benefit plans governed by ERISA's reporting and disclosure requirements who file Form 5500 must attach an audit report conducted by an independent qualified public accountant. The department comments that it does not wish to duplicate existing reporting and providing the exemption for those employee benefit plans that file Form 5500 satisfies that objective.

We ask that OLMS clarify one inconsistency between its discussion within the proposal (84 FR 25134) and other sections of its discussion (84 FR 25157) including the proposed Form T-1 instructions. In the initial portion of OLMS's explanation for requiring the Form T-1, it says that this current proposal is consistent with the 2008 rule, but in contrast to the 2003 and 2006 rules regarding the exemption for ERISA plans; however, other references including the proposed instructions, propose the opposite. This difference relates to whether the Form 5500 exemption is permitted for employee benefit plans that are required to file Form 5500 (2008 version) or employee benefit plans that file a Form 5500 (2003 and 2006 versions). This distinction is important. The current proposed Form T-1 instructions states that the exemption applies to any employee benefit plan that files a Form 5500 under ERISA (84 FR 25157) and we agree that this exemption should remain in the final rule.

The 2008 final rule limited the Form 5500 exemption to trusts that were required to file a Form 5500. (73 FR 57428) The reason given in 2008 for limiting the Form 5500 exemption 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. *Id*. 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 it is for that same union to extract the financial information otherwise needed to file a Form T-1 report on the trust. Therefore the reasoning behind the 2008 limitation to the exemption was flawed. We support using the 2003 and 2006 language because any employee benefit plan that elects to file Form 5500 with all its detail, attached audit report and heavy ESBA oversight and scrutiny should be provided the same exemption as an employee benefit plan that is required to file Form 5500 because the information reported and agency oversight is identical so the exemption should also be identical.

The Department provides examples in its discussion about illegal or corrupt behavior of certain trusts as a primary reason behind the proposal. The proposal says that trust reporting is necessary to prevent the circumvention or evasion of Labor Management Reporting and Disclosure Act's reporting requirements. In each example provided in the proposal involving an ERISA covered plan, Form 5500 would have required the disclosure of this activity as a nonexempt party in interest transaction. Further, auditors are required to ensure disclosure of nonexempt party in interest transactions in the audited financial statements as defined by professional standards. Finally, any prohibited transactions are required to be reported on Form 5500 on Schedule G - Nonexempt Transactions also must file a corresponding excise tax filing which includes a 10% penalty for the amount of the prohibited transaction. We support the exemption from filing Form T-1 for any ERISA plan who files a complete and timely Form 5500.

Itemization of Receipts Pursuant to a Collective Bargaining Agreement using the Audit Exemption

The 2008 Form T-1 rule included an exemption from itemized reporting on Schedule 1 for contributions received by employers pursuant to a collective bargaining agreement. (73 FR 57466). The reason for this exemption was the concern about including information in the filing that could reveal meaningful operational data to a business competitor that would unnecessarily affect a contributing employer's business. However, this same language is not

explicitly stated in the instructions for the audit exemption. The proposed instructions limit this reporting exemption to Schedule 1 of Form T-1 (84 FR 25164) but not the schedule of contributions required if using the audit exemption. We ask that the instructions be clarified to treat employer contributions pursuant to a collective bargaining agreement the same whether filing Form T-1 or utilizing the audit exemption.

Consideration of an Additional Exemption from Filing Form T-1 – Fraternal Benefit Societies

The proposal includes several exemptions from filing Form T-1. We have previously discussed the Form 5500 exemption but there are other exemptions for organizations that currently report to other state or federal agencies where the reporting is similar to that required on the proposed Form T-1. Specifically, political action committees that file publicly available reports, federal health plans covered by the provisions of the Federal Employee Health Benefits Acts and a new exemption for a for-profit commercial bank establish or operating pursuant to the Bank Holding Act of 1956. (84 FR 25157) In line with these exemptions, we request that OLMS consider an exemption for labor organization sponsored fraternal benefit societies which are governed by strict state insurance laws. Fraternal benefit societies operate under a rigorous regulatory framework of state insurance laws, coupled with stringent requirements of the state insurance commissioners ("Commissioners") that oversee these insurance organizations. The state insurance laws involves an extensive amount of regulation, supervision, reporting, disclosure and other compliance requirements applicable to fraternal benefit societies.

Fraternal benefit societies generally issue life insurance products to members of the sponsoring organizations. In order to sell life insurance products, the fraternal benefit society seeks a license from a domicile state which extends significant regulation, examination, and supervision by the state department of insurance. These state regulations generally stipulate, among other things, the types of insurance benefits a fraternal benefit society may issue to its members, the types of investments it can invest in, how its assets must be managed, and standards for determining the adequacy of its reserves maintained to satisfy its policyholder obligations.

With respect to reporting, fraternal benefit societies are generally required to file with their state Commissioner a true statement of its financial condition, transactions and affairs on quarterly and annual basis in a form approved by the National Association of Insurance Commissioners ("NAIC") for fraternal benefit societies, plus any supplemental information required by the Commissioner, together with a valuation of its certificates in force for the prior year, as certified by a qualified actuary. The reports produced and submitted by the fraternal benefit society are available to the public which provides transparency. They are also generally required to maintain a Certificate of Authority to sell insurance issued by the state which is renewed annually. Fraternal benefit societies are also subject to periodic on-site examination by the Commissioner, often every 5 years or less. Moreover, these societies are subject to liquidation or receivership by the Commissioner if certain deficiencies set forth in the state insurance law are determined to exist.

Fraternal benefit societies, in addition to the enormous oversight and regulations stated above, are also subject to state insurance requirements for any state which they sell insurance products. Fraternal benefit societies are subject to just as much, if not more, state government reporting requirements, oversight and control as these other entities and, accordingly, should also be excepted from the Proposed T-1 Rule.

Respectfully submitted,

Scott M. Price