National Coordinating Committee for Multiemployer Plans

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Via E-mail and UPS Overnight Mail

OLMS-REG-1215-AB49@dol.gov

Kay Oshel, Director
Office of Policy, Reports and Disclosure
Office of Labor-Management Standards
U.S. Department of Labor
200 Constitution Avenue, NW
Room N-5605
Washington, DC 20210

Re: RIN 1215-AB49 Labor Organization Officer and Employee Reports Proposed Rules

Dear Ms. Oshel:

These comments are filed by the National Coordinating Committee for Multiemployer Plans ("NCCMP") in response to the request by the Department of Labor's Office of Labor-Management Standards ("OLMS") for public comments on its Proposed Rules to revise the Labor Organization Officer and Employee Reports (Form LM-30) and its instructions. The Form LM-30 implements section 202 of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. §432. Congress authorized the Secretary of Labor "to issue, amend and rescind rules and regulations prescribing the form and publication of [the Form LM-30] . . . and such other reasonable rules and regulations (including rules prescribing reports concerning trusts in which a labor organization is interested) as . . . necessary to prevent the circumvention or evasion of such reporting requirements."[1]

The NCCMP is the only national organization devoted exclusively to protecting the interests of the approximately ten million workers, retirees, and their

[1] LMRDA §208, 29 U.S.C. §438.

families who rely on multiemployer defined benefit pension plans[2] for retirement benefits and the more than twenty million workers, retirees and dependents who receive health and other benefits from multiemployer welfare funds. Our purpose is to assure an environment in which multiemployer plans can continue their vital role in providing benefits to working men and women. The NCCMP is a nonprofit organization, with members, plans and plan sponsors in every major segment of the multiemployer plan universe, including in the airline, building and construction, entertainment, food production, distribution and retail sales, health care, hospitality, mining, maritime, industrial fabrication, service, textile, and trucking industries.

The NCCMP often participates in agency rulemaking where potential agency action will impact multiemployer plans. Multiemployer plans are governed by and administered in accordance with the Employee Retirement Income Security Act of 1974 ("ERISA") and typically are qualified trusts under sections 401(a) and 501(a) of the Internal Revenue Code ("IRC"). Accordingly, most of our comments respond to proposed rulemaking by the Department of Labor's Employee Benefit Security Administration ("EBSA") and the Internal Revenue Service's Employee Plans, Tax Exempt and Government Entities Division.[3]

In addition to responding to proposed agency action through formal comment, NCCMP often facilitates ongoing dialogues with federal agencies in an effort to share our members' concerns, questions and practical insights with those agencies charged with enforcing what is a most complex area of federal regulation. We often invite representatives of the EBSA and the IRS to discuss recent regulatory developments with our members. At the same time, representatives of these agencies will reach out to the NCCMP and its team of professionals in order to seek our input on matters that may be of special relevance to the multiemployer plan community. In this regard, one will find that the NCCMP's relationship with the EBSA and the IRS is frequently collaborative as much as cooperative.

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[2] Under ERISA, a multiemployer plan is a plan "(i) to which more than one employer is required to contribute, (ii) which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer, and (iii) which satisfies such other requirements as the Secretary [of Labor] may prescribe by regulation." *See* ERISA section 3(37)(A), 29 U.S.C. §1002(37)(A).

[3] While this is a general rule, it is not without exceptions. Other federal agencies, such as the U.S. Department of Health and Human Services, have proposed and promulgated regulations that directly impact the administration of multiemployer plans.

Similarly, the NCCMP acknowledges that beginning in the latter half of 2005, upon our request OLMS personnel consulted with representatives of the Committee after it became apparent to the NCCMP and its members that substantive and significant informal guidance issued by OLMS may have a direct impact on multiemployer plan administration. Of special concern to the multiemployer plan community was the agency's June 29, 2005 publication "Filing Form LM-30: An Overview of Union Officer and Employee Reporting," its subsequent publication on June 27, 2005 "Trusts and Form LM-30 and Form LM-10," and finally, its November 10, 2005 publication "Form LM-10 (Employer Reports) Frequently Asked Questions."[4]

Notwithstanding OLMS' efforts to consult with the NCCMP throughout this period, numerous questions concerning Form LM-30 and Form LM-10 remain unanswered, and many of these questions have a direct impact on multiemployer plans and their trustees, administrators and service providers. OLMS' Form LM-30 Proposed Rules address a number of these questions but leave others unresolved. Even more troubling to our members, however, as drafted the Proposed Rules and instructions will have a burdensome, costly and unnecessarily duplicative impact on the administration of multiemployer plans, trustees and service providers.

We are mindful that Congress vested OLMS with the authority to adopt reasonable rules and regulations as necessary to prevent the circumvention or evasion of reporting requirements under Section 202 of the LMRDA. Moreover, we are mindful of the fact that Form LM-30 and its instructions have not been revised for over forty years and may need updating to address what the preamble of the Proposed Rules captions as "Increases in Sophistication and Complexity of Financial Practices."[5] However, the Proposed Rules also overlook or fail to take into account ERISA,[6] its complex regulations (including extensive regulations on reporting and

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[4] This latter publication, along with OLMS' advisory announcing an increase in the Form LM-30 "de minimis exemption" from $25 to $250, was issued after the agency published the Proposed Rules.

[5] *See* Labor Organization Officer and Employee Reports; Proposed Rules, 70 Fed. Reg. 51166 at 51170 (Aug. 29, 2005) ("While the same statutory disclosure standard applies now as it did when the Act took effect, the financial activities of individuals and organizations have increased exponentially in scope, complexity and interdependence over the past four decades.").

[6] In several examples, the Proposed Rules treat "ERISA" as an adjective (*i.e.,* "ERISA plan"). Yet the Proposed Rules do not include one reference to several of the Act's provisions that would appear to have special relevance in any inquiry involving "transactions" or "dealings" between employee benefit plans and union officers or employees: (1) ERISA's notice and disclosure

disclosure) and the body of law that has developed since 1974 that has drastically altered the regulatory framework governing employee benefit plans. Moreover, nowhere in the preamble of the Proposed Rules will one find any analysis that would indicate a nexus between transactions involving ERISA plans and circumvention or evasion of reporting requirements under the LMRDA.

It is this last observation that underscores the primary purpose of our comments. Moreover, our comments respond to the Department's express request for comments on the issue of "whether trusts and such organizations constitute, or can constitute, 'business[es]' under [LMRDA] sections 202(a)(3) and (a)(4), or "employers" under section 202(a)(6), so that payments to union officials would be reportable. What activities or transactions between trusts and other organizations and the union would rise to the level of dealings? What factors, if any, should the Department consider when determining if trusts and other organizations are businesses or employers?"[7]

As noted in the preamble of the Proposed Rules, agency action to revise Form LM-30 is part of a four-year effort to "improve voluntary compliance with, and enforcement of, the LMRDA."[8] While efforts to reinvigorate compliance and enforcement of the LMRDA are commendable, we also believe these recent efforts by OLMS offer an opportunity for the Department of Labor to revisit specific regulations adopted before the enactment of ERISA that have been rendered obsolete or redundant by that Act. Accordingly, the NCCMP contends that the prudent way of addressing issues involving the treatment of transactions involving "trusts in which the union is interested," is by amending or adopting regulations excluding in most cases transactions involving trusts governed by ERISA from LMRDA section 202(a) reporting requirements.

In the event OLMS continues to require union officers and employees to report transactions, interests, etc. involving trusts governed by ERISA, we also have taken this opportunity to comment on a number of other matters of special concern to the multiemployer plan community.

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requirements; (2) ERISA's fiduciary standards, and (3) ERISA's prohibited transaction provisions. *See* discussion, *infra* at 18-25.

[7] *See* 70 Fed. Reg. at 51182.

[8] *See* 70 Fed. Reg. at 51167.

Summary of NCCMP's Comments

The following concerns of the NCCMP and its members will be addressed in these comments:

- It is the NCCMP's primary position, based on the legislative history of the LMRDA, the Welfare and Pension Plan Disclosure Act of 1958 ("WPPDA") and ERISA, that the reporting requirements of LMRDA section 202(a) were not intended to regulate employee benefit plans covered by ERISA. For this reason, transactions and other dealings related to ERISA plans, including multiemployer plans, generally should be excluded from LMRDA reporting and disclosure requirements.

- In the event, OLMS adopts final regulations requiring the reporting of any transaction or other dealing related to multiemployer plans, the following issues are raised in these comments—

  1. *The Proposed Rules define "labor organization" too broadly.*

  2. *The current instructions for Form LM-30 include a general exclusion for "sporadic or occasional gifts, gratuities, or loans of insubstantial value, given under circumstances or terms unrelated to the recipient's status in a labor organization." This general exclusion should be maintained under a new Form LM-30. In the alternative, this general exclusion could be incorporated into the de minimis exception. The benefit of this approach is twofold. First, it would establish a bright line exclusion that would eliminate any uncertainty and confusion many filers may have regarding the definition of terms such as "sporadic," "occasional," and "insubstantial." Second, it would promote uniform reporting by greatly reducing the instances of under-reporting or over-reporting.*

  3. *The de minimis exception should be preserved and be clearly defined and updated.*

  4. *The definition of bona fide employee should be articulated so as to clearly indicate that employer payments that relate to an employee's time lost while attending a trustees meeting of an employee benefit plan be excluded from reporting under subsection A5 of the proposed form.*

  5. *The instructions should reflect Congress' directive that a union official's investments and other sources of income which would not pose a conflict of interest between the official and union members not be reported.*

1. The Reporting Requirements of LMRDA §202(a) were not Intended to Regulate Employee Benefit Plans Covered by ERISA.

A. Current Rule

In 1963, pursuant to section 208 of the LMRDA, the Secretary of Labor promulgated several regulations including 29 CFR §404.2, which provides—

> Every labor organization officer and employee who in any fiscal year has been involved in transactions of the type described in section 202(a) of the Act, or who holds or has held any interest in an employer or a business of the type referred to therein, or who has received any payments of the type referred to in that section, ***or who holds or has held an interest in or derived income or economic benefit with monetary value from a business any part of which consists of dealing with a trust in which his labor organization is interested***, or whose spouse or minor child has been involved in such transactions, holds or has held any such interests, or has received such payments, is required to file with the Office of Labor-Management Standards, . . . a signed report containing the detailed information required therein by section 202(a) of the Act, . . .

(emphasis added). This regulation's reference to the reporting of interests, income or economic benefits derived from a business dealing with a trust in which a labor organization is interested is not found in section 202(a) of the Act. Part B of the Current Form LM-30 includes the regulation's reference to trust funds and requires a union official to report interests in and income derived from a business dealing with a trust in which the labor organization is interested.

Earlier last year, OLMS announced guidance concerning Form LM-30 and Form LM-10 filing requirements specifically for trust funds. "Trusts and Form LM-30 and Form LM-10" (June 27, 2005). For purposes of Form LM-30 reporting requirements related to trust funds, OLMS considered each of the current form's three categories of reporting (Parts A, B and C).

(i) Reporting under Part A

According to the June 27, 2005 announcement, Part A would not be used for reporting payments from a trust unless an officer's or employee's union represents or seeks to represent employees of the trust. A union officer or employee must report in

Part A interests in, transactions with, or income or other benefits (including reimbursed expenses) from, an employer whose employees the filer's union represents or actively seeks to represent. If this condition is met, the union officer or employee must report any such payments unless they are covered by the exclusions in the instructions to Part A of current Form LM-30. One of the exclusions is for payments and benefits received as a bona fide employee of the employer (that is, the trust). Therefore, any officer or employee of the union who is also an employee of the trust (a trustee typically is not an employee) would not have to report in Part A any payments received as a bona fide employee of the trust.

(ii) *Reporting under Part B*

In order for a trust to be within the scope of Part B, OLMS advises that the trust must meet two conditions:

(1) *The trust must be a business.* It is OLMS' position that "while it cannot be categorically stated that all trusts are businesses, there is a strong presumption that by their nature most trusts are businesses. In light of the commercial activities engaged in by many such trusts, their status as "business[es]" seems apparent. The same conflict of interest problems presented by payments from an ordinary business to a union official are presented by payments from a trust," and

(2) *The trust must deal with the union or deal in substantial part with an employer whose employees the union represents or actively seeks to represent.* The announcement explains that trusts typically engage in numerous "dealing[s]" with their related unions, which include receiving financial support directly from the union or from employers obligated to fund the trust under collective bargaining agreements negotiated by the union. Joint activities between the union and the trust, as well as any commercial activities would also indicate "dealings." Based on OLMS' current understanding of the nature and activities of trusts in which unions are interested, OLMS has concluded that payments from such trusts to union officials are reportable on Form LM-30, so long as no filing exemptions are applicable.

OLMS advises that if a trust meets the above conditions, a union officer or employee must report any interests in, transactions with, or income or other benefits (including reimbursed expenses) from the trust unless they are covered by the exclusions in the instructions to Part B. Moreover, because Part B does not have an exclusion for payments and benefits received as a bona fide employee, if a trust meets

the above conditions, a union officer or employee must report payments from the trust, including salary or reimbursed expenses, in Part B.

(iii) Reporting under Part C

Part C of the current Form LM-30 is used for reporting interests in, transactions with, or income or other benefits from, an employer not covered by Part A or Part B "*if the transaction constitutes, or creates the appearance of, a conflict of interest*."[9] OLMS emphasizes that "employer" is broadly defined in LMRDA §3(e). In this recent advice, OLMS explained that if the trust has any employees, it is an employer. Furthermore, a payment from a trust to an officer of a union that negotiates with an employer concerning the financing of the trust "*would present a potential conflict of interest*." Therefore, an officer or employee of a labor organization would have to complete Part C with respect to payments from a trust which meets the above conditions unless they are covered by the exclusions in the instructions for Part C of the current form.

B. Interim OLMS Guidance

On November 10, 2005, OLMS issued an advisory for employers regarding Form LM-10 reporting obligations. Included in those guidelines was an announcement that the Department of Labor would not file an enforcement action seeking Form LM-10 reports of payments from trusts to union officials who are acting as trustees of such trusts, pending the completion of Form LM-30 rulemaking. Moreover, we understand that the Agency also will not seek to enforce LM-30 filing requirements for payments from trust funds (including reimbursed expenses) received by union officers who are trustees of the fund pending the completion of this rulemaking.

Nevertheless, we recognize that this latest advisory does not characterize OLMS' decision not to require reporting of transactions between trust funds and trustees as an "exemption." Indeed, on several occasions OLMS representatives have stated to the ERISA plan community that they do not see why trust fund transactions should be exempted from Form LM-10 or Form LM-30 reporting. Nevertheless,

[9] The phrase ". . . the transaction constitutes, or creates the appearance of, a conflict of interest . . . " is set forth in the June 2005 announcement. However, this phrase will not be found in the current Form LM-30, the regulations or the LMRDA. Nevertheless, there is little doubt that this limitation on reporting reflects Congress' intent.

within this same advisory OLMS has urged interested parties to comment on whether such transactions should be exempted.

The Form LM-10 Advisory also sets forth the OLMS' position that if a service provider to a trust is an "employer" (*i.e.*, hires at least one employee), and makes a payment to a union or a union official that is not subject to a specific exemption (including the de minimis exemption), the service provider must file a Form LM-10. We understand this rule for Form LM-10 reporting also is the position OLMS has taken for Form LM-30 reporting; that is, a union officer or employee who receives a payment from a service provider to a trust, including a multiemployer plan, must file a Form LM-30 unless such payment is subject to a specific exemption (including the de minimis exemption).

We note with some surprise that in its Form LM-10 Advisory OLMS states that the Department of Labor is not required to engage in rulemaking before issuing guidance that trusts, including multiemployer plans, are covered by the Form LM-10.[10] The Advisory further explains that the "Department's views on whether the LMRDA requires disclosure of payments from trusts to union officials have *evolved* over time." With all due respect, we believe that the Department's position has not "evolved" so much as it has "reversed." As explained in the Advisory, for at least 38 years it has been OLMS' position that officers of labor organizations who receive payments from "union and employer established pension and welfare plans" (this would include

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[10] In this latest advisory, OLMS also states that the Department has not made any change in its interpretation of section 203(a) of the LMRDA with regard to LM-10 reporting obligations of service providers to trusts, explaining that "any entity that meets the statutory definition of an 'employer' is considered an employer under the LMRDA. Significantly, in reaching this conclusion OLMS relies, in part, on the current instructions for Form LM-30:

> The Form LM-30. . . requires union officers and union employees to report payments from a "business … any part of which consists of buying from, selling or leasing to, or otherwise dealing with … a trust in which your labor organization is interested." Form LM-30 Instructions, Part B. . . Although the language in the Form LM-10 is different, requiring reports of payments from "any employer," its breadth plainly covers service providers. This inference is made unavoidable by the specificity of the Form LM-30, which expressly singles out these transactions.

As discussed below, the NCCMP believes that the provision of the current instructions for Form LM-30 that requires union officials to report payments from a business any part of which consists of buying from, selling or leasing to, or otherwise dealing with *a trust in which your labor organization is interested* is not required by the statute and, moreover, is duplicative, burdensome and misdirected.

multiemployer plans) did not have to report such payments on Form LM-30. Nevertheless, in its June 27, 2005 advisory "Trusts and Form LM-30 and Form LM-10," OLMS reversed its position, and stated "that payments from trusts to union officers and employees are reportable on Form LM-30 if the trust is an employer or business, and stated that there is a strong presumption that by their nature most trusts are businesses. OLMS also indicated that payments from trusts to unions or union officials would be reportable on Form LM-10, if the trust is an employer."

Fortunately for the NCCMP and its members, the Department of Labor now seeks "comments on whether a trust is, or can constitute, an 'employer' or a 'business,' making such payments reportable on the Form LM-30."

C. Proposed Rule

The Proposed Rules do not amend 29 CFR §404.2. However, in the preamble of the Proposed Rules, OLMS requests comments on the following:

- Whether trusts and such organizations constitute, or can constitute, "businesses" under sections 202(a)(3) and (a)(4), or "employers" under section 202(a)(6), so that payments to union officials would be reportable.

- What activities or transactions between trusts and other organizations and the union would rise to the level of dealings? What factors, if any, should the Department consider when determining if trusts and other organizations are businesses or employers?

D. Comment

Congress never intended to apply the LMRDA's reporting and disclosure requirements to employee benefit plans. Rather, Congress sought to regulate transactions and other dealings by and between ERISA plans and union officers and employees[11] through ERISA's extensive reporting and disclosure provisions,[12]

[11] For purposes of ERISA, and in the context of multiemployer plans, a union officer or employee will be deemed "party in interest" as to an employee benefit plan, if he or she is (A) "a fiduciary (including, but not limited to, any administrator, officer, trustee, or custodian), or employee of such employee benefit plan; (B) a person providing services to such plan; or (C) an employer any of whose employees are covered by such plan." ERISA section 3(14), 29 U.S.C. §1002(14). Moreover, "an employee organization any of whose members are covered by such plan" is a party in interest as to that plan. ERISA section 3(14)(D), 29 U.S.C. §1002(14)(D).

[12] *See generally,* ERISA sections 101 through 110, 29 U.S.C. §§1021-1030.

fiduciary requirements[13] and prohibitions against certain party-in-interest transactions.[14] For this reason, requiring reports of dealings between a union officer or employee and an ERISA plan or a service provider of such plan under LMRDA section 202(a) is duplicative, burdensome and misdirected.

(i) Legislative History: LMRA, WPPDA, LMRDA and ERISA

To understand why LMRDA reporting is ill-suited to multiemployer plans, one must first understand the origin of these plans; *i.e.*, the enactment of Section 302 of the Labor-Management Relations Act of 1947 ("LMRA" or "Taft-Hartley Act") and the subsequent evolution of Congress' regulation of all employee benefit plans. Prior to 1947, an employee benefit plan sponsored or established by a labor organization was typically administered solely by a labor organization or its officers. Congress, concerned about potential abuse exclusive union control over such plans could have on the commerce of the United States generally and on the rights of employees in particular, enacted Section 302,[15] which renders illegal any payment by an employer to a union or its officials except in narrowly defined circumstances. One of those exceptions, set forth in LMRA Section 302(c)(5), permits employer payments to any employee benefit plan if—

- Such payments are made to a separate trust fund established for the purpose of providing medical, retirement or occupational injury benefits or unemployment, disability, accident or life insurance;
- Such payments are held in trust for the sole and exclusive benefit of employees and their dependents;
- The detailed basis for such payments is set forth in a written agreement with the employer;
- Management and labor are equally represented in the trust's administration; and

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[13] *See generally,* ERISA sections 401 through 405 and 409, 29 U.S.C. §§1101-1105, 1109.

[14] *See generally,* ERISA sections 406 through 408, 29 U.S.C. §§1106-1108.

[15] For a discussion on the legislative intent of Section 302 and its structural safeguards for multiemployer plans, see *United Mine Workers of Am. Health & Retirement Funds v. Robinson*, 455 U.S. 562, 570-573 (1982).

- An annual audit of the fund's assets is conducted by an independent accountant.

The employee benefit plans that meet these requirements are the multiemployer plans the NCCMP now represents. As a consequence of satisfying the requirements set forth in Section 302(c)(5), the assets of these multiemployer plans can no longer be considered under the control of the labor organizations that may have established or sponsored them. Rather, they are trust funds administered by an independent board of trustees comprised of an equal number of management and labor representatives. Moreover, as discussed in detail below, as a matter of law any officer or employee of a labor organization who is appointed to serve as a trustee of a multiemployer plan does not act on behalf of his or her labor organization when serving as trustee.

Within the framework of federal labor law, the LMRA effectively severed the governance of multiemployer plans from the labor organizations that sponsored or established them. It follows that in the absence of any evidence of legislative intent to the contrary, those federal labor laws governing the conduct of labor organizations and their officers and employees should not regulate the administration of multiemployer plans. Accordingly, significance should be given to the absence of any reference to employee benefit plans in Congress' declaration of findings, purposes and policy underscoring its enactment of the LMRDA in 1959. *See e.g.,* LMRDA Section 2(b), 29 U.S.C. § 401(b), (While Congress cites the need to protect the rights and interest of employees and the public generally as they relate to the activities of "labor organizations, employers, labor relations consultants, and their officers and representatives," there is no reference to the activities of "trusts in which a labor organization is interested" including multiemployer plans); LMRDA Section 2(c), 29 U.S.C. § 401(c), (While Congress finds that the LMRDA is "necessary to eliminate or prevent improper practices on the part of labor organizations, employers, labor relations consultants, and their officers and representatives which distort and defeat the policies of the Labor Management Relations Act, 1947, as amended. . . ," there is no indication that Congress sought to include employee benefit plans among the entities subject to LMRDA regulation.).

This is not to say that Congress did not have growing concerns over the administration of employee benefit plans during this period. Indeed, Congress was well aware that the rapid growth of employee benefit plans since World War II and the lack of regulation of those plans warranted federal legislation that would protect the interests of participants and beneficiaries of these plans. Initially, federal

regulation of employee benefit plans was established through the WPPDA.[16] Moreover, unlike Section 302(c)(5) of the LMRA, the WPPDA would regulate *all* employee benefit plans, not merely multiemployer plans or other plans that were funded by employer contributions and sponsored or established by labor organizations. Indeed, the enactment of the WPPDA was Congress' first effort to establish a federal framework of employee benefits law that transcends federal laws regulating labor-management relations.

Significantly, the WPPDA, which predates the LMRDA, addressed the first of five recommendations of the U.S. Senate Select Committee on Improper Activities in the Labor or Management Field. These recommendations included—

(1) Legislation to regulate and control pension, health, and welfare funds;
(2) Legislation to regulate and control union funds;
(3) Legislation to insure union democracy;
(4) Legislation to curb activities of middlemen in labor management disputes;
(5) Legislation to clarify the "no man's land" in labor-management relations.[17]

The key report on the reporting aspects of the LMRDA[18] notes these five legislative recommendations and further explains that "[o]ne of these has been implemented in the passage of Public Law 85-836" (*i.e.,* the WPPDA).[19] The Report further explains that the bill ultimately to become the LMRDA "implements the remaining recommendations of the McClellan committee."

Similar to the LMRDA's reporting and disclosure provisions, the WPPDA placed on welfare and pension plan administrators the obligation to disclose to plan participants and beneficiaries and report to the Secretary of Labor certain information including the plan's annual report.[20] Section 8(b) of the WPPDA further provided

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[16] Public Law 85-836 (Aug. 28, 1958).

[17] S. Rep. No. 1417, 85th Cong., 2d Sess. 450 (1958), quoted in 1 LMRDA Leg. Hist. 759-760 (within H. Rep. No. 741).

[18] Senate Report No. 187, 86th Cong., 1st Sess. (1959).

[19] S. Rep. No. 187, p. 2, 1 LMRDA Leg. Hist. 398.

[20] *See* WPPDA sections 5, 7 and 8.

that the Secretary of Labor "shall make available for examination" the annual reports filed by plan administrators.[21] Finally, section 9 of the WPPDA included civil and criminal enforcement provisions for those who failed to comply with its reporting and disclosure requirements.

Notwithstanding Congress' best intentions, the WPPDA failed to adequately address the issues of national concern relating to "the continued well-being and security of millions of employees and their dependents [who] are directly affected by [employee welfare and pension benefit] plans."[22] Accordingly, in the early 1970s

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[21] *See* WPPDA section 8(b).

[22] *See* WPPDA section 2(a) ("Findings and Policy"). The WPPDA's legislative history identified a number of infirmities relating to the rapid growth of employee benefit plans during the 1940s and 1950s which demanded some action on the part of the federal government to regulate them. Significantly, these infirmities were clearly independent of and beyond the scope of those problems confronting union members as outlined in the legislative history of the LMRDA—

> The very characteristics of these plans and the accelerated rate of their development have made them susceptible to weaknesses, waste, abuses, and unnecessary losses to the beneficiaries. Their size, the grouping together for coverage of large numbers of people, the pooling of vast sums of money, the size of insurance premiums, third-party or management control of the plans accompanied by vagueness of employee rights and a prevailing attitude in certain quarters that the employees have no right to know how the finances of the plan are managed have made the plans vulnerable to a host of infirmities. The administrator of a plan, *whether he be an employer, union official, or independent trustee,* bears a fiduciary relationship to the employee-beneficiaries if he takes their contributions or part of the compensation which would otherwise be paid them to buy insurance or to finance a pension plan. The employees are told that the plan will provide certain benefits, but collectively or individually the employees have no means of determining whether the benefits provided are worth the compensation withheld and the direct contributions they have made unless an accounting is made to them. . . . Numerous instances have been disclosed by previous investigations, ranging from outright looting of the funds of employee-benefit plans and corrupt administration on the part of the administrators or trustees of such plans, to waste, indifference, ineptness, lack of know-how, and downright disregard for the rights of the employee beneficiaries. Most of the abuses were disclosed in joint employer-union administered plans where most of the investigations were conducted but some instances of abuse and mismanagement came to light in employer-administered level of benefit plans. . . Although failure to give an accounting to employee beneficiaries or to report on the financial operation of employee-benefit plans is not unique to any particular type of plan, in many employer-administered fixed benefit or so-called level-of-benefit plans the withholding of information respecting the operation of the plans is claimed as a matter of right.

Congress reexamined the federal government's role in protecting millions of participants and beneficiaries of employee benefit plans; this reexamination led to the enactment of ERISA. ERISA would "repeal" the WPPDA and replace the latter statute's reporting and disclosure requirements with—

> …provisions requiring the reporting of more detailed information concerning the administration of plan assets and the payment of benefits, including the particulars of party-in-interest transactions and information concerning all large transactions. In addition, annual reports must include an audit by an independent qualified accountant, and an actuarial valuation of the plan's assets and liabilities. Plan participants would be entitled to receive a reasonably comprehensive summary of the major plan provisions, written so as to be understandable by the average plan participant.[23]

Of course the enactment of ERISA went far beyond mere reporting and disclosure to protect the interests of plan participants and beneficiaries. In particular, ERISA established a codified strict fiduciary standard for individuals dealing with plan assets and prescribed exacting prohibitions against party in interest transactions:

> Despite the value of full reporting and disclosure, it has become clear that such provisions are not in themselves sufficient to safeguard employee benefit plan assets from such abuses as self-dealing, imprudent investing, and misappropriation of plan funds. Neither existing State nor Federal law has been effective in preventing or correcting many of these abuses. Accordingly, the legislation imposes strict fiduciary obligations on those who have discretion or responsibility respecting the management, handling, or disposition of pension or welfare plan assets. The objectives of these provisions are to make applicable the law of trusts; to prohibit exculpatory clauses that have often been used in this field; to establish uniform fiduciary standards to prevent transactions which dissipate or endanger plan assets; and to provide effective remedies for breaches of trust. . . .

S. Rep. 1440, 85th Cong., 2nd Sess. 1958, quoted in 1958 U.S.C.C.A.N. 4137, 4146-4147. (Apr. 21, 1958).

[23] Employee Retirement Income Security Act of 1974—Conference Report, reported in Legislative History of the Employee Retirement Income Security Act of 1974 (Pub. Law. 93-406), at 4742.

> The bill prohibits fiduciaries from engaging in transactions involving the transfer of assets between the plan and parties in interest; or transactions in which the fiduciary deals with the assets of the plan for his own account, receives consideration from any party dealing with the plan, or acts on behalf of a party whose interests are adverse to those of the plan. While the House bill would have permitted the transfer of assets between the plan and a party-in-interest as long as the transfer was for adequate consideration, the Senate view has been that the adequate consideration test may not be sufficient protection against the temptations for wrongdoing inherent in these kinds of transactions, and the conferees agreed to accept the Senate view on this issue.
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> The conference substitute does provide specific exceptions from the prohibited transactions rules, similar to those contained in the Senate bill, for certain established practices which are regarded as consistent with the sound and efficient functioning of employee benefit plans, and additional exceptions may be obtained administratively upon a showing that the transaction is in the best interest of the plan and its participants, that adequate safeguards are provided, and that the exception is administratively feasible.
>
> One issue that has occasioned considerable interest relates to those situations where a fiduciary also provides other services to a plan, and may, because of his fiduciary position, be in a position to influence the extent or cost of the other service he provides. Some such multiple services are now commonly provided by banking, investment and other financial institutions, and may be quite beneficial to the plans utilizing them. Accordingly, the conferees have expressly permitted such services where it was possible to devise adequate statutory safeguards. In other areas, it was left to the affected plans or the providers of such services to seek administrative exceptions, subject to such conditions as the administering agencies believe are required to protect the interests of the plan and its participants.[24]

Read in conjunction, the legislative histories of LMRDA and ERISA reveal a demarcation between those "dealings" of a union officer or employee that may conflict with his or her duties to union members, which are reportable under LMRDA section 202, and the reporting and disclosure of the "particulars of party-in-

[24] *Id.* at 4743-4744.

interest transactions and information concerning all large transactions" relating to an ERISA governed employee benefit plan, which are reportable under ERISA's reporting and disclosure provisions. Moreover, the legislative histories of both federal statutes indicate that the class to be protected by the statutes' respective notice and disclosure requirements are by no means identical. While the LMRDA sought to protect union members, ERISA's reporting and disclosure requirements were adopted to protect participants and beneficiaries of employee benefit plans regardless of their status as union members. Indeed, since the late 1950's, the class of individuals protected by the LMRDA has contracted significantly while those individuals who are participants or beneficiaries of ERISA plans has increased exponentially.[25]

Finally, any argument that LMRDA reporting and disclosure obligations may fill gaps where ERISA's reporting and disclosure provisions fall short in addressing conflict of interest transactions is misplaced. ERISA's legislative history indicates a regulatory framework that was designed to police any transactions or dealings involving the transfer of assets between the plan and parties-in-interest, or transactions in which the fiduciary deals with the assets of the plan for his own account, receives consideration from any party dealing with the plan, or acts on behalf of a party whose interests are adverse to those of the plan.

(ii) ERISA's relevant reporting requirements.

Neither the Proposed Rules nor the detailed preamble reference ERISA's reporting and disclosure requirements or, for that matter, discuss whether Form LM-30 filing on transactions relating to ERISA governed trusts would address any real or

[25] Multiemployer plans are unique, however, in that they are established through collective bargaining and for the most part provide benefits to union members and their dependents. Nevertheless, participants of multiemployer plans are not exclusively union members. In fact, union membership may not be considered in determining a participant's eligibility to receive benefits. *See Suburban Teamsters of Northern Illinois Welfare and Pension Funds v. P.F. D'Anna, Inc.*, 2000 U.S. Dist. LEXIS 18156 (N. D. Ill. 2000) (". . . union membership plays no role in the administration of multi-employer pension and welfare funds under ERISA."); *Blankenship v. Boyle*, 329 F. Supp. 1089 (D. D.C. 1971). Further, a pension plan participant whose employer ceases to be signatory to a collective bargaining agreement may choose to rescind his or her membership in the union. Nevertheless, if that individual is partially or fully vested in his or her pension, that individual will continue to be accorded the rights of a participant of the multiemployer plan under ERISA well after his or her union membership expires. Nor will an individual's status as a participant under ERISA change after retirement notwithstanding the fact that his or her union may no longer be obligated to bargain on his or her behalf. *See Allied Chemical & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971) (An employer is not obligated to bargain with a union concerning the welfare benefits of former employees who have retired from jobs in the bargaining unit).

perceived effort by union officers or employees to circumvent the reporting requirements of the LMRDA. A review of the relevant provisions of ERISA, its underlying Department of Labor regulations, and the Form 5500 and its instructions indicate that what could be construed as a conflict of interest for a union officer or employee (or any party-in-interest as to an ERISA plan), would likely be disclosed on a Form 5500.[26]

ERISA generally prohibits transactions involving the transfer of assets between the plan and parties in interest, transactions in which a fiduciary deals with the assets of the plan for his own account, receives consideration from any party dealing with the plan, or acts on behalf of a party whose interests are adverse to those of the plan. Prohibitions against such transactions, which may constitute conflicts between the interests of the fiduciary and that of the plan or its participants and

[26] The preamble to the proposed rules references several instances where "compliance with Form LM-30 requirements would have revealed criminal conduct." Significantly, the third example involved an investment firm that managed investments for Taft-Hartley pension funds. This company collapsed, costing its clients $355 million. The firm's former chairman was indicted on counts of fraud, money laundering and making illegal payments to benefit plan trustees. "As part of its scheme to buy the influence of pension fund trustees, who were union officers, the investment firm hired relatives of pension trustees as well as provided plan trustees with gifts including rifles, season tickets to sporting events, and fishing and hunting trips to various locations in the western U.S., Canada, Africa, Argentina and Mexico." *See* 70 Fed. Reg. at 51173. Immediately following this example, OLMS notes that it "expects that by clarifying the form and instructions . . . [Form LM-30] filing rates will increase." *Id.* While the NCCMP finds the conduct described in the example deplorable (the case, *United States v. Kirkland*, 330 F. Supp. 2d 1151 (D. Ore. 2004), is often used to illustrate criminal conduct by fiduciaries and service providers relating to ERISA plans), we are hard pressed to believe that truly bad actors will report criminal activities on any disclosure form mandated by the LMRDA or ERISA. In this regard it bears repeating that when Congress enacted ERISA, it recognized that mandatory reporting and disclosure was not enough to address abuses relating to ERISA plan assets. Thus, Congress established stringent civil and criminal enforcement provisions, including criminal penalties for violating ERISA's reporting and disclosure requirements. *See* ERISA section 501, 29 U.S.C. §1131. *See also*, 18 U.S.C §1954, which "applies to the offer, solicitation, acceptance or receipt of things of value because of or with the intent to be influenced with respect to the operation of an ERISA-covered plan." "§1954 is intended to reach a broad class of persons who are connected with the operation of employee benefit plans." *See, generally,* United States Department of Justice, *United States Attorneys' Manual*, tit. 9, §2422, *available at,* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm02422.htm. Moreover, it should be noted that the conduct described in *Kirkland* could have been easily committed by employer trustees of a multiemployer plan or, for that matter, any fiduciary or administrator of an ERISA plan. *See, e.g.*, *United States v. Blood*, 806 F.2d 1218 (4th Cir. 1986) (Defendant who established a firm to market prepaid legal services plans to employers and employee organizations convicted of criminal violations under ERISA section 501 for failing to file Form 5500s.) Of course, these individuals are not required to File LM-30s.

beneficiaries, are described in section 406 of ERISA, which provides in relevant part—

Prohibited transactions.
(a) Transactions between plan and party in interest.
Except as provided in section 408:
(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—
(A) sale or exchange, or leasing, of any property between the plan and a party in interest;
(B) lending of money or other extension of credit between the plan and a party in interest;
(C) furnishing of goods, services, or facilities between the plan and a party in interest . . .
(b) Transactions between plan and fiduciary.
A fiduciary with respect to a plan shall not—
(1) deal with the assets of the plan in his own interest or for his own account,
(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or
(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

These prohibited transactions are subject to detailed reporting to the Secretary of Labor and disclosure to plan participants and beneficiaries. In accordance with regulations promulgated by the Secretary of Labor, each plan must include a detailed description of each transaction described in ERISA section 406 on a schedule attached to the plan's annual report (Form 5500). ERISA's annual reporting and disclosure requirements for party-in-interest transactions are set forth in section 103(b)(3)(E) of the Act—

§103. Annual reports.
(a) Publication and filing.
(1)(A) An annual report shall be published with respect to every employee benefit plan to which this part applies. Such report shall be filed with the Secretary in accordance with section 104(a), and shall

be made available and furnished to participants in accordance with section 104(b). . . .

(b) Financial statement.

An annual report under this section shall include a financial statement containing the following information: . . . .

(3) With respect to all employee benefit plans, the statement . . . shall have the following information in separate schedules: . . .

(D) a schedule of each transaction involving a person known to be a party in interest, the identity of such party in interest and his relationship or that of any other party in interest to the plan, a description of each asset to which the transaction relates; the purchase or selling price in case of a sale or purchase, the rental in case of a lease, or the interest rate and maturity date in case of a loan; expenses incurred in connection the transaction; the cost of the asset, the current value of the asset, and the net gain (or loss) on each transaction . . .

In the exercise of agency discretion, the Secretary of Labor has provided that not all transactions with a party-in-interest need be reported in the plan's annual report. Similar to the exclusions set forth in current Form LM-30 and Form LM-10, the Secretary has found that certain transactions, which clearly do not create conflicts, need not be reported. *See* 29 C.F.R. §2520.103-10(b)(3)(i), (ii) and (iii). For example a plan need not report prohibited transactions exempted under ERISA sections 408(a)[27] and (b).[28]

[27] Under ERISA section 408(a), the Secretary of Labor may "grant a conditional or unconditional exemption of any fiduciary or transaction, or class of fiduciaries or transactions, from all or part of the restrictions imposed by [ERISA section 406]." Such exemptions by the Secretary may only be made after consultation and coordination with the Secretary of the Treasury and can not be granted unless it is found to be (1) administratively feasible, (2) in the interests of the plan and of its participants and beneficiaries, and (3) protective of the rights of participants and beneficiaries. Such exemptions are granted only after notice is given to interested persons and interested persons are afforded the opportunity to present their views.

[28] ERISA section 408(b) lists "statutory exemptions" to section 406's prohibitions. These statutory exemptions include loans if they are available to all participants and beneficiaries in a reasonably equivalent basis, are not available to "highly compensated employees" in an amount greater than the amount made available to other employees, are made in accordance with specific plan provisions, bear a reasonable rate of interest, and are adequately secured. ERISA section 408(b)(1). Also, contracting or making reasonable arrangements with a party-in-interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid. ERISA section 408(b)(2).

Significantly, while union officers and employees may be parties-in-interest and are often fiduciaries as to multiemployer plans governed by ERISA, there is no distinction under the Act or its regulations that places a greater reporting and disclosure burden on these individuals based on their status as union officers or employees. For that matter, a trustee who happens to be a union officer or employee is held to the same fiduciary standards as any other ERISA fiduciary. Thus, any reporting and disclosure obligation under the LMRDA which relates solely to a union officer's or employee's dealings with an ERISA plan, places an arbitrary burden on these individuals which does not exist for other ERISA fiduciaries.[29]

We also question whether reporting by union officials alone concerning their dealings relating to multiemployer trust funds would be an effective way of protecting the interests of union members who may be participants in those funds. Due to the fact that multiemployer trust funds are subject to the Taft-Hartley Act's requirement that employees and employers be equally represented in the administration of such funds,[30] a reporting and disclosure obligation falling on only one side of a joint board of trustees seems utterly illogical unless one were to intimate that trustees appointed by a union are inherently less trustworthy than their employer counterparts. Indeed, since OLMS first announced its position that transactions involving trust funds must be reported on Form LM-30, both employer-appointed and union-appointed trustees of multiemployer plans have repeatedly expressed their bewilderment over a reporting requirement that only falls upon half of the trustees. As a rule, all trustees of multiemployer plans are keenly aware of their fiduciary obligations under ERISA and understand that no trustee may deal with the assets of an ERISA plan in his or her own interest or account or on behalf of a party whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries.

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[29] As detailed above, when enacting ERISA Congress sought to provide plan participants and beneficiaries with a wide range of safeguards beyond mere reporting and disclosure of party-in-interest transactions. One of these safeguards is an unobstructed path to federal court to obtain appropriate relief for any fiduciary breach, to enjoin any violation of ERISA section 406, or to obtain other appropriate equitable relief to address such violation. *See* ERISA section 502(a)(2) and (3), 29 U.S.C. §1132(a)(2), and (3).

[30] In order for an employer's payments to a multiemployer plan to be excepted from the prohibitions of LMRA section 302(a) and (b) (29 U.S.C. §186(a) and (b))—(1) the plan must be a trust fund established for the sole and exclusive benefit of the employees of the employer, and their families and dependents; (2) the detailed basis on which such payments are to be made must be specified in a written agreement with the employer; (3) the employees and employers must be equally represented in the administration of the fund; and (4) the plan must be subject to an annual audit, a statement of the results of which must be available for inspection by interested persons. LMRA section 302(c)(5), 29 U.S.C. §186(c)(5).

Therefore, we believe the final Form LM-30 regulations should be drafted so as to avoid any blurring of the lines between a union-appointed trustee's obligations as a plan fiduciary and his or her obligations to a labor organization and its membership. To illustrate the importance of this distinction, one may consider the following example:

> A president of a union also sits as a trustee of a multiemployer welfare fund. This official is retired, and both she and her spouse are covered under the welfare plan as retirees. The plan's actuary informs the trustees that the plan's funding status is such that the trustees may adopt a series of benefit improvements. The trustees note that any benefit improvement should benefit both active participants and retired participants. The trustees, therefore, adopt an amendment that (1) decreases the copayment for active participants from 20 percent to 15 percent and (2) reduces monthly premiums for retirees by 75 dollars a month. If the trustees did not lower the monthly premiums for retirees by 75 dollars, they could have decreased the copayment for active participant from 20 percent to 10 percent.

The union president has participated in a transaction with a trust in which her union is interested that will result in a total savings for her of 900 dollars a year. Moreover, by including a benefit improvement to retirees, she has arguably acted in a manner that is not in the best interest of the union's active members. Surely it is not the Department's position that this transaction is reportable under Form LM-30 or, for that matter, that the LMRDA governs this transaction at all. Yet how is this transaction any different from a transaction where the plan reimburses a union-appointed trustee for the costs of attending an educational conference that concerns the impact of rising retiree healthcare costs on group health plans? *Cf. Mahoney v. Board of Trustees*, 973 F.2d 968, 971-75 (1st Cir. 1992).

(iii) Recognizing the distinctions between labor representative and ERISA fiduciary and union member and participant: NLRB v. Amax Coal.

At first blush, there is a certain practical appeal to the notion that union officers and employees should report their dealings related to the multiemployer trust funds in which their members participate even though ERISA clearly provides far greater safeguards to plan participants than mere reporting and disclosure obligations. Yet this appeal does not withstand scrutiny. Specifically, the notion runs afoul of a bedrock principle of ERISA first articulated by the U.S. Supreme Court in *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981). That is, in their capacity as trustees of

multiemployer plans, union and employer representatives[31] *must* cease to act on behalf of the employers or unions that appointed them—

> Whatever may have remained implicit in Congress' view of the employee benefit fund trustee under the [LMRA] became explicit when Congress passed [ERISA]. ERISA essentially codified the strict fiduciary standards that a . . . trustee must meet. . . Section 404(a)(1) of ERISA requires a trustee to "discharge his duties . . . solely in the interest of the participants and beneficiaries . . . ." [Section] 406(b)(2) declares that a trustee may not "act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries . . ." Section 405(a) imposes on each trustee an affirmative duty to prevent every other trustee of the same fund from breaching fiduciary duties, including the duty to act solely on behalf of the beneficiaries. . . . Finally, [section] 406(a)(1)(E) prohibits any transaction between the trust and a "party in interest" . . . In sum, ERISA vests the "exclusive authority and discretion to manage and control the assets of the plan" in the trustees alone, and not the employer or the union. The language and legislative history of [LMRA section] 302(c)(5) and ERISA therefore demonstrate that an employee benefit fund trustee is a fiduciary whose duty to the trust beneficiaries must overcome any loyalty to the interest of the party that appointed him. Thus, the statutes defining the duties of a management-appointed trustee make it virtually self-evident that welfare fund trustees are not "representatives for the purposes of collective bargaining or the adjustment of grievances" within the meaning of §8(b)(1)(B) [of the National Labor Relations Act].

Amax Coal, 453 U.S. at 332-333.

As described above, placing LMRDA reporting requirements on union officials for dealings solely related to their roles as fiduciaries of multiemployer plans blurs the clear line which delineates the officials' obligations under the LMRDA (as well as other labor laws) from their obligations as ERISA plan fiduciaries. Moreover, while the duty a *union official* owes a *union member* is governed by labor laws such as the LMRDA and the National Labor Relations Act, the duty a *union-appointed trustee* owes a

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[31] Section 408(c)(3) of ERISA permits a trustee of an employee benefit fund to serve as an agent or representative of the union or employer. "However, that provision in no way limits the duty of such a person to follow the law's fiduciary standards while he is performing his responsibilities as trustee." *Amax Coal*, at 333.

union member who is a *participant* of that trust fund is governed strictly by ERISA. As one court has explained in the context of an action brought under LMRDA section 501(a) (fiduciary responsibilities of officers of labor organizations)—

> To state a claim, it is essential that the breach of duty relate to the union's "money or property." 29 U.S.C. §501(a). The gravamen of plaintiff's complaint is that defendants, acting as trustees of the . . . Pension Fund, failed to protect the assets of the Fund against the imprudence of the court-appointed investment manager. The . . . Pension Trust Fund, however, is not union property, but is a jointly administered employee benefit trust fund governed by the fiduciary standards of ERISA. . . Indeed, the purpose of ERISA was to ensure that the benefits be preserved for employees and their dependents, and not fall under the control of either the union . . . or the employer . . . Although both the union and the employer appoint the Fund's trustees, ERISA directs that the trustee's duty to the trust beneficiaries must overcome any loyalty to the interest of the party that appoints him." . . . As a result, the Pension Trust Fund cannot be considered "money or property" of the union under §501(b) of the LMRDA, nor do plan trustees owe a fiduciary duty to the union that appointed them.

Livingston v. Mazzola, No. C 90-1813 RFP, 1991 U.S. Dist. LEXIS 8326, *3 (N.D. Cal. June 4, 1991) (citations to *Amax Coal* omitted).[32]

(iv) OLMS' approach in the context of Form T-1

In 2003, OLMS issued its final rules for Labor Organization Annual Financial Reports. *See* 68 Fed. Reg. 58374. The final rules introduced a new Department of Labor Form T-1, which established reporting requirements relating to "significant trusts in which the labor organization is interested." But, *see AFL-CIO v. Chao*, 409 F.3d 377 (D.C. Cir. 2005) (vacating the provisions of the final rule relating to Form T-

[32] *See also, Morrissey v. Curran*, 483 F.2d 480, 484 (2d Cir. 1973) (Even before the enactment of ERISA, the court recognized that LMRDA section 501(a) "was aimed at stopping the pilfering of union funds by union officers, not at the conduct of trustees [of a union officers pension fund] acting in their capacity as fiduciaries."); *Yager v. Carey*, 910 F. Supp. 704, 728 (D. D.C. 1995) (LMRDA Section 501 does not apply to amounts paid by a union once they are transferred to a pension plan); *Forline v. Helpers Local No. 42*, 211 F. Supp. 315 (E.D. Pa. 1962) ((Pre-ERISA) LMRDA section 501 "deals with 'wrongdoings' in the handling of union funds and gives union members the right to bring actions . . . It is not designed to obtain information regarding the status of welfare funds. Union members seeking such information must do so under §8 of the [WPPDA] by proceeding against the administrator or trustee of the fund. . .").

1) when promulgating the final rule, OLMS apparently recognized the merits of ERISA's reporting and disclosure requirements and accordingly established an exception to Form T-1 reporting:

> [T]he Department has continued to provide four exceptions to the Form T-1 requirement: (1) a PAC fund, if publicly available reports on the PAC's funds are filed with federal or state agencies; (2) any political organization for which reports are filed with the IRS under 26 U.S.C. 527; (3) *employee benefit plans filing a complete and timely report under ERISA*; and (4) any covered trust or fund for which an independent audit has been conducted in accordance with standards prescribed in the final rule. For the first three categories, the exception is complete. No Form T-1 is required. For the fourth category, a union must file the Form T-1, but can file the independent audit in lieu of providing the financial information otherwise required by Form T-1. The audit will be required to meet either the requirements of *29 CFR 2520.103-1 et seq. (relating to annual reports and financial statements required to be filed under ERISA)* or the standards described in detail in the Instructions to Form T-1.

68 Fed. Reg. at 58414 (emphasis added).

The final rules for Form T-1 indicate the Department's approval of ERISA's disclosure and reporting requirements and its acknowledgment that those requirements on their own would thwart efforts to circumvent or evade the LMRDA's reporting requirements. Understandably, we suggest that OLMS again adopt the reasoning it articulated in the Form T-1 final rules.

(v) Three exceptions to a proposed multiemployer plan exclusion

Notwithstanding the comments set forth above, we can envision three instances where Form LM-30 reporting by a union officer or employee may be required where that official's dealings concern a multiemployer plan. First, in those cases where the multiemployer plan is an employer whose employees the union official's labor organization represents or seeks to represent, the union official should report under A1, A2, A3, or A5 (whichever is applicable), subject to the exclusions set forth in the instructions. Second, in those cases where a service provider to the multiemployer plan also provides services to the union official's labor organization, the union official should report under A4, subject to the exclusions set forth in the instructions. And third, in those cases where a service provider to the multiemployer plan is an employer the union official's union represents or seeks to represent.

D. Suggested Action

1. The following reference to "a trust in which a labor organization is interested" set forth in 29 C.F.R. 404.2 should be deleted:

   . . . or who holds or has held an interest in or derived income or economic benefit with monetary value from a business any part of which consists of dealing with a trust in which his labor organization is interested, . . .

2. Exceptions should be included in the instructions that would exclude reporting for transactions involving ERISA plans. For instance, under A1 the exclusion may read:

   You are not required to report any stock, bond, security, or other interest, legal or equitable, which you or your spouse or minor child directly or indirectly held in, and any income or any other benefit with monetary value (including reimbursed expenses) which you or your spouse or minor child derived directly or indirectly from an employee benefit plan that filed a complete and timely annual report pursuant to the requirements of ERISA section 103, 104(a) and 1030, and 29 C.F.R. 2520.103-1, for a plan year ending during the reporting period of the union ("ERISA Plan") or from a business dealing with such plan unless:

   (1) such plan is an employer whose employees your labor organization represents or is actively seeking to represent;

   (2) in the case of a business dealing with such plan, such business also buys from, or sells or leases directly or indirectly to, or otherwise deals with your labor organization; or

   (3) in the case of an employer dealing with such plan, your labor organization represents or seeks to represent the employees of such employer.

3. Suggested examples:

   You are a union officer and a trustee of an ERISA Plan. You attend an educational conference and are later reimbursed by the ERISA Plan for the cost of the conference in the amount of $500. You do not have to report this transaction even though the ERISA Plan is a trust in which your labor organization is interested unless the ERISA Plan is an employer whose employees your labor organization represents or is seeking to represent.

You are a union officer and a trustee of an ERISA Plan. The accounting firm that provides accounting services to the ERISA Plan sponsors an education conference relating to ERISA accounting practices. It is the general policy of the accounting firm not to charge any of its institutional clients' fees for attending these conferences. Accordingly, you attend the conference and pay no fees. You need not report this transaction unless the accounting firm also provides services to your labor organization or unless your labor organization represents or seeks to represent the accounting firm's employees.

You are a union officer and a trustee of an ERISA Plan. An accounting firm provides accounting services to the ERISA Plan and your labor organization. The accounting firm sponsors a 5-day educational conference relating to both ERISA Plan and labor organization accounting practices. The accounting firm pays for both you and your spouse to attend the conference. You must report this transaction.

You are a union officer and a trustee of an ERISA Plan. An accounting firm provides accounting service to the ERISA Plan. The clerical workers of the accounting firm are represented by your labor organization. The accounting firm sponsors an educational conference for ERISA Plan trustees. The accounting firm pays for both you and your spouse to attend the conference. You must report this transaction.

We believe our suggestions achieve two key purposes. First, the changes provide a clear demarcation between those transactions that Congress sought to regulate through ERISA and those transactions Congress sought to regulate through the LMRDA. Thus, a union official will continue to report under Form LM-30 those transactions that relate to his or her duties as an officer or employee of a labor organization while the conduct of a union-appointed trustee will continue to be governed by ERISA. Second, in the event a transaction *may* implicate a union official's duties under ERISA and the LMRDA, the three exceptions to the ERISA Plan reporting exclusion ensures that such transactions will be reported under Form LM-30.

2. <u>Other Matters</u>

- **The Proposed Rules define "labor organization" too broadly.**

A. Current Rule

The statutory definition of "labor organization"[33] is included in the back of the current Form LM-30 instructions. The current instructions provide no further guidance. It is our understanding, that most union officers and employees consider "labor organization" to be the individual labor organization which they serve or by which they are employed.

B. Proposed Rule

The Proposed Rules defines "labor organization" broadly—

> *Labor organization* means the local, intermediate, or national or international labor organization that employed the filer, or in which the filer held office during the reporting period, ***and any parent or subordinate labor organization of the filer's labor organization***.

Under this proposed definition of labor organization an officer or employee of a local union must file reports when he or she engages in transactions with a business that deals with his or her affiliated national labor organization, or engages in transactions with an employer whose employees the national labor organization is actively seeking to represent. Similarly, an officer or employee of a national union must file reports when he or she engages in transactions with a business that deals with an affiliated subordinate labor organization, or engages in transactions with an employer whose employees a subordinate labor organization is actively seeking to represent.

C. Comment

Of special concern to the multiemployer plan community is OLMS' position that when determining whether a report must be filed due to payments from, or interests held in, a business that deals with a trust in which a labor organization is interested, the term "labor organization" will retain this expanded meaning. Thus, an officer of a local union must file reports when he or she engages in transactions with a

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[33] Under LMRDA section 3(i)—

> "Labor organization" means a labor organization engaged in an industry affecting commerce and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization, other than a State or local central body.

business that deals with a trust in which his or her affiliated national labor organization is interested, and an officer of an international union must file reports when he or she engages in transactions with a business that deals with any of its affiliated local unions' related trusts.

The reporting by union officers and employees under this interpretation of labor organization becomes exponentially more burdensome and complex to the individual filer. For example, suppose an employee of a local union who is not a trustee of any multiemployer plan, along with two of her brothers, is treated to a round of golf by an accountant friend who happens to provide accounting services to a national pension fund in which the union employee's national labor organization is interested. What if the employee doesn't know about this relationship? How can there be a conflict?

Through these sweeping principles of attribution, the proposed rules treat a trust in which a *local labor organization* is interested as a trust in which that local's international union is interested. Similarly, the proposed rules treat trusts in which an international labor organization is interested as a trust in which each of its affiliated local unions is interested. As a consequence, unknowing officers and employees of various labor organizations undoubtedly will fail to fully comply with their filing requirements even in instances where there is no possibility that transactions reportable under the proposed rules could give rise to a conflict of interest.

With this in mind, we were struck by the chart which sets forth the Hour and Cost Burden Estimates of the proposed form and instructions, which allocates *10 minutes* to the task of maintaining and gathering records. If the proposed definition of labor organization is incorporated into the final form and instructions, we find this estimate in most cases utterly unrealistic. For instance, an employee of an international labor organization must account for any transaction with any business or employer that provides services to (a) his international union, (b) any trust in which his international union is interested, (c) any local union affiliate of his international union, and (d) any trust in which a local union affiliate is interested.

How many businesses and employers may that be? To be conservative, let's say the international union contracts with twenty-five service providers, there are five trusts in which the international union is interested, each of these trusts contract with ten service providers, the international has 300 local affiliates, each local affiliate does business with an average of fifteen service providers, on average there are two trusts each local affiliate is interested and each of these trusts contract with an average of ten service providers:

- 25 service providers for the international union
- 50 service providers for trusts in which the international union is interested
- 4,500 service providers for local union affiliates
- 6,000 service providers for trusts in which local affiliates are interested

This union official would have to account for possible transactions with over 10,000 employers or businesses. If, as we suggest, those transactions solely relating to service providers of ERISA plans are not subject to Form LM-30 reporting, that union officer would still have to account for possible transactions with 4,525 employers or businesses. And if this were not burdensome enough, it should be kept in mind that this is not a fixed group of employers and businesses. It is safe to say that a constant flow of service providers are being retained and terminated by each of these entities throughout the year.[34]

D. Suggested Action

The proposed expansive definition of labor organization should be modified by deleting ". . . and any parent or subordinate labor organization of the filer's labor organization."

- **The current instructions for Form LM-30 include a general exclusion for "sporadic or occasional gifts, gratuities, or loans of insubstantial value, given under circumstances or terms unrelated to the recipient's status in a labor organization." This general exclusion should be maintained under a new Form LM-30. . .**

- **and the de minimis exception should be preserved and be clearly defined and updated.**

A. Current Rule

(i) sporadic or occasional

The current instructions for Form LM-30 include a general exclusion for "sporadic or occasional gifts, gratuities, or loans of insubstantial value, given under circumstances or terms unrelated to the recipient's status in a labor organization."

(ii) de minimis

[34] Also, the union official must account for any transaction between these employers and businesses and his spouse or minor children.

The LMRDA Interpretive Manual first referenced a de minimis exception to reporting in the early 1960s. The de minimis exception is a practical means of acknowledging that some transactions are just too small to worry about. As the Manual notes—

> We should all take cognizance of the "de minimis non curat lex" doctrine. This means that courts will not find persons guilty of acts involving trivial sums of money. . .

OLMS first approached the de minimis exception by the nature of the transaction and its apparent value, though it ultimately resigned itself to case by case analysis—

> . . . when an employer picks up the lunch tab when he and the union the union officer have had lunch together, no report will be required from either. Likewise, a Christmas gift of nominal value would not require reports. However, when the "de minimis" point has been passed, reports are required. A gift of a car by the employer to the union leader will of course require a report. Each case, as it arises, must be considered on its own facts.

OLMS revised its approach in July 2005—

> The instructions for Form LM-30 provide that union officers of employees "do not have to report any sporadic or occasional gifts, gratuities, or loans of insubstantial value, given under circumstances unrelated to the recipient's status in a labor organization." Previous examples of "de minimis" situations were when an employer picked up the lunch tab when he and a union officer ate together or when an employer gave a union officer a Christmas gift of nominal value. A car was given as an example of a gift that would require a report. In order to provide more guidance on this issue, OLMS has determined that anything with a value of $25 or less will be considered "de minimis" and therefore not reportable if it is given under circumstances unrelated to the recipient's status in a labor organization as discussed below in Manual Entry 241.710.

B. Interim Guidance

On November 7, 2005, OLMS announced a change in its $25.00 "de minimis" rule. Pending final rules on Form LM-30, gratuities or loans with a value of $250 or

less received by a union officer or employee will be considered insubstantial for purposes of Form LM-30 reporting. However, if the *aggregate value* of multiple gifts or loans from a single employer to a single union official exceeds $250 in a fiscal year, the transaction will no longer be treated as de minimis, and the aggregate value of the transactions will be reportable. Gifts and loans from multiple employees of one employer should be treated as originating from a single employer when calculating whether the $250 threshold has been exceeded.

In adopting the new rule OLMS explained that the $25 threshold "places an unnecessary reporting burden on union officials without a corresponding benefit to union members or the public." While we welcome the $250 aggregate de minimis rule, it does nothing to reduce a union official's recordkeeping burden. Since the $250 threshold is an annual aggregate, a union official must continue to keep a record of anything of value received from an employer, whether it is worth $2 or $249.

C. Proposed Rule

The proposed Form LM-30 and its instructions do not include the sporadic and occasional or de minimis exceptions. However, OLMS requests comments regarding both.

D. Comment

The current LM-30 instructions could be improved by establishing bright-line test for "sporadic or occasional" and "insubstantial value." However, eliminating the exclusion all together places significant and unreasonable burdens and costs on filers. Certainly there is a point where a gift, gratuity or loan is so small as to pose no risk of presenting a conflict of interest that will divide an officer's or employee's loyalties.

E. Suggested Action

We find that OLMS' reference to the financial disclosure reports for Federal Government employees (Form 450 and SF 278) is one reasonable method for establishing a bright line de minimis standard. Notwithstanding the fact that the interim $250 de minimis exception is less than the de minimis amount prescribed in the current Form 450 and SF 278, we believe that amount is a suitable de minimis figure. However, unlike the Interim Rule, we suggest that the final rules incorporate a base line "per transaction" de minimis exception similar to that used in the Form 450 and SF 278, which would exclude from the annual aggregate maximum single transactions involving small amounts. In this case, we suggest a per transaction minimum of $100.00.

Accordingly, the de minimis exclusion could read as follows:

Union officers of employees do not have to report any sporadic or occasional transaction of insubstantial value provided under circumstances unrelated to the recipient's status in a labor organization. To determine whether a transaction is sporadic or occasional and of insubstantial value, it may be assumed that gratuities or loans with an aggregate value of $250 or less received by a union officer or employee during a fiscal year will be de minimis and not subject to reporting under Form LM-30. If the aggregate value of multiple gifts or loans from a single employer to a single union official exceeds $250 in a fiscal year, the transaction (or transactions) will no longer be treated as de minimis, and the aggregate value of the transactions and a description of each transaction over the fiscal year will be reportable. However, for purposes of determining whether a single transaction should be counted towards the annual aggregate of $250.00, any single transaction with a value of less than $100 need not be considered. For purposes of this rule, gifts and loans from multiple employees or agents of one employer should be treated as originating from a single employer.

- **The definition of bona fide employee should be articulated so as to clearly indicate that employer payments that relate to an employee's time lost while attending a trustees meeting of an employee benefit plan be excluded from reporting under A5.**

A. Current Rule

The current Form LM-30 instructions treat as non-reportable payments by an employer to an officer or employee of a labor organization for "activities other than productive work . . . if the payments the for such period of time are: (a) Required by law or a bona fide collective bargaining agreement, (b) or made pursuant to a custom or practice under such a collective bargaining agreement, or (c) made pursuant to a policy, custom, or practice with respect to employment in the establishment which the employer has adopted without regard to any holding by such employee of a position with a labor organization."

B. Proposed Rule

Under the proposed instructions, an officer or employee would have to report any payments other than "productive work," including union-leave and no-docking payments."

C. Comment

While this change would appear to have a nominal impact on the administration of multiemployer plans, it is our understanding that there is a custom and practice among some employers to pay for periods of time lost to employees for activities related to their attendance at periodic trustees meetings of related employee benefit plans.

While we leave to others the task of commenting on reporting requirements for employer payments for non-productive work for periods the officer or employee is engaged in union activities, the reporting requirements under A5 of the proposed Form LM-30 should not apply to employer payments that relate to an employee's time lost while attending a trustees meeting of an employee benefit plan. Clearly these payments do not relate to that officer's role as a representative of the employer's employees.

D. Suggested Action

If the proposed rules' requirement that filers report any payments other than productive work, including union-leave and no-docking payments, the following provision should be included under the heading *Note on the definition [of bona fide employee]*: "Notwithstanding the above, an employer's payment for periods of time lost to employees for activities related to their attendance at periodic trustees meetings of an ERISA plan need not be reported if such payments are required under a collective bargaining agreement or in instances where there is an established custom and practice for an employer to provide such payment.

- **The instructions should reflect Congress' directive that a union official's investments and other sources of income which would not pose a conflict of interest between the official and union members not be reported.**

A. Current Rule

The instructions to Part C of the current Form LM-30 do not state whether reporting is limited to situations in which there is a "conflict of interest." Nevertheless, the LMRDA Interpretive Manual provides valuable insight into the purpose of Part C of the form and section 202(a)(6) of the Act. In particular, §248.005 of the Manual ("Scope of Section") discusses what is meant by "those

situations which pose conflict of interest problems which are not covered in the previous 5 sections of 202."[35]

Sometimes referred to as the "catch all" provision of section 202(a), section 202(a)(6) does not include qualifying language suggesting that only those transactions implicating a conflict of interest need be reported by the officer or employee. Nevertheless, it is clear from the Manual, that for over forty years the Department of Labor has limited section 202(a)(6) reporting to those transactions that at least have the appearance of a conflict. To illustrate what is and what is not a "conflict" for purposes of section 202(a)(6), the Manual provides this hypothetical—

> Conflict of interest reporting under §202(a)(6) does not require an employer who manufacturers sweaters in California to report a wedding gift of $1,000 he has given to his son-in-law who is the Business Agent of a Machinist Union in Pittsburgh for the reason that, in the absence of any other factors, no conflict of interest situation is posed.

OLMS concludes that "the key issue of the problem lies in whether the payment (received by the union officer) poses a 'conflict of interest' in the responsibilities of the union officer to his members to whom he owes fiduciary responsibilities as a union officer to represent them with undivided loyalty."[36]

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[35] To help illustrate what is meant by "conflict of interest problems," OLMS relies on the Committee Reports, which provide—

> Union Officer C accepts a payment from employer K with the understanding that C's union will not attempt to organize the K firm plant.
>
> Normally it would be expected that C's union would attempt to organize that plant. This transaction, which is reportable under 202(a)(6) . . . by the union officer, (and by the employer under 203(a)(1)) is one that is also indictable under section 302(a) of the Taft-Hartley Act.

LMRDA Interpretive Manual, at §248.005 (citation to Committee Reports not supplied).

[36] *See* LMRDA section 501, 29 U.S.C. §501, (Fiduciary responsibility of officers of labor organization).

B. Proposed Rule

The proposed rule does not reference Congress' directive that a union official's investments and other sources of income which would not pose a conflict of interest between the official and union members not be reported.

C. Comment

Congress' declared purpose in enacting section 202(a) of the LMRDA was to accomplish "[f]ull reporting and public disclosure of financial transactions and holdings, if any, by union officials which might give rise to conflicts of interest, including payments received from labor relations consultants."[37] But what of those dealings by union officers or employees that clearly do not give rise to a conflict of interest? According to the Act's legislative history, Congress sought to place a reasonable limit on reporting whereby the interests of union members and the general public to obtain information regarding any investments or transactions in which a union officer's or employee's financial interests may conflict with his or her duties to union members would be weighed against the privacy rights of union officers and employees who may hold investments and have other sources of income that in no way implicate a conflict of interest between the union official and his or her members:

> The Government which vests in labor unions the power to act as exclusive bargaining representative must make certain that this power is exercised for the benefit of employees whom the unions represent for purposes of collective bargaining and not for personal profit and advantage of the officers and representatives of the union.
>
> The committee bill attacks the problem by requiring officers and employees of unions to file reports with the Secretary of Labor disclosing to union members and the general public any investments or transactions in which their personal financial interests may conflict with their duties to the members. *The bill requires only the disclosure of conflicts of interest as specified therein. The other investments of union officials and their sources of income are left private. No union officer or employee is obliged to file a report unless he holds a questionable interest in or has engaged in a questionable transaction.*[38]

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[37] S. Rep. No. 187, 86th Cong., 1st Sess. 450 (1959), quoted in 1 LMRDA Leg. Hist. 398.

[38] S. Rep. No. 1417, 85th Cong., 2d Sess. 450 (1958), quoted in 1 LMRDA Leg. Hist. 769 (within H. Rep. No. 741) (emphasis added).

For purposes of Form LM-30 reporting, OLMS now vests "employer" with an expansive definition.[39] Thus, the instructions relating to subsection A6 of the proposed Form LM-30 (which corresponds with LMRDA section 202(a)(6)) indicates that *any* payments and other things of value, including reimbursed expenses, "from businesses and employers that are not covered by the more specific provisions of sections A1-A5" must be reported. Section A6 of the proposed Form LM-30. The legislative history of section 202(a)(6) indicates that its purpose was to—

> require[ ] a union official to disclose any payment received from an employer or from any person who acts as a labor relations consultant for an employer except for payments permitted by section 302 of the [LMRA]. The purpose of this paragraph, among other things, is to reach the union official who may receive a payment from an employer not to organize the employees.[40]

As noted above, the interests of union members and the general public to obtain information regarding any investments or transactions in which a union official's financial interests may conflict with his or her duties to union members should be weighed against the privacy rights of the union official who may hold investments and have other sources of income that in no way implicate a conflict of interest between the official and union members. This legislative history should be read into reporting requirements under section 202(a)(6). However, at least one example set forth in the proposed instructions clearly indicates that any transaction

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[39] It is worth noting that "employer," while given a broad meaning under the LMRDA, is defined in the Act with an eye towards the relationships between employers, employees and labor organizations—

> "Employer" means any employer or any group or association of employers engaged in an industry affecting commerce (1) which is, with respect to employees engaged in an industry affecting commerce, an employer within the meaning of any law of the United States relating to the employment of employees, or (2) which may deal with any labor organization concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work, and includes any person acting directly or indirectly as an employer or as an agent of an employer in relation to an employee but does not include the United States or any corporation wholly owned by the Government of the United States or any State or political subdivision thereof.

LMRDA section 3(e), 29 U.S.C. 402(e).

[40] S. Rep. No. 187, 86th Cong., 1st Sess. 450 (1959), quoted in 1 LMRDA Leg. Hist. 412.

between a union officer or employee (or his or her spouse or minor child) and an employer which would not be reportable under A1 through A5 must be reported in A6 regardless of whether a conflict may exist.

The proposed rule appears to gloss over Congress' directive that a union official's investments and other sources of income which would not pose a conflict of interest between the official and union members not be reported. As a consequence, the proposed rules, Form LM-30 and instructions lead to burdensome and intrusive disclosures of personal information of private citizens that in no way advance the intent of section 202(a).

D. Suggested Action

The instructions should clearly explain to filers that there is a "conflict of interest" requirement applicable to A6 of the proposed Form LM-30. In addition, Example 1, on page 10 of the proposed instructions—

> You are a union officer and an attorney. Employers whose employees your labor organization does not represent or actively seek to represent often hire your law firm. One of those employers gives you a special gift of a three-week all-expense-paid trip to France as a reward for winning a major lawsuit. You must report the trip and its value under this subsection.

should be deleted, or its last sentence modified to read: "You need not report the trip and its value under the subsection unless the trip would otherwise conflict with your duties to the members of your labor organization."

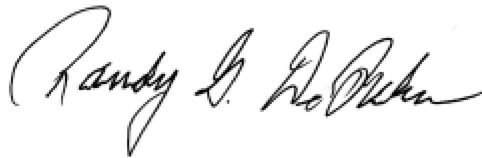
* * * *

As explained above, the NCCMP's primary concern with the proposed rules is that they place burdensome reporting and disclosure requirements on ERISA plans, administrators and fiduciaries over and above the reporting and disclosure requirements of ERISA. This additional administrative burden would have to be assumed by individuals dealing with ERISA plans notwithstanding the fact that when Congress enacted ERISA it provided plan participants and beneficiaries with detailed and reticulated regulatory safeguards of which reporting and disclosure is merely one part. As currently proposed, we in the multiemployer plan community are hard pressed to find how these rules, when applied to dealings involving multiemployer plans, will prevent real or perceived efforts to circumvent or evade reporting requirements under the LMRDA. Though we respect the Department's recent efforts

to improve voluntary compliance with the Act's reporting requirements, to the extent such efforts are targeted towards trust funds strictly regulated by ERISA, such efforts are misplaced, redundant, and of dubious value to union members, participants and beneficiaries of ERISA plans and taxpayers.

We appreciate the opportunity to comment on these proposed rules and urge your careful consideration of the recommendations set forth above. We also request the opportunity to explain and expand on these comments in the event any of our comments require further amplification or if it is determined that a public hearing of these matters would be beneficial.

Respectfully submitted,



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