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Via E-mail @ Regulations.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-5609
Washington, DC 20210

Re: RIN 1215-AB64 Labor Organization Annual Financial Reports

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 concerning its Proposed Rule to establish a form to be used by labor organizations to file trust annual financial reports with OLMS ("Form T-1 Trust Annual Report" or "Form T-1"). 73 Fed. Reg. 11754 (March 4, 2008).

INTRODUCTION

OLMS bases its authority to issue the rule establishing Form T-1 on section 201 ("Report of labor organizations") and section 208 ("Rules and regulations; simplified reports") of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. §§ 431 and 438. 73 Fed. Reg. at 11764. LMRDA section 201(b) provides:

> **(b) Annual financial report; filing; contents**
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> Every labor organization shall file annually with the Secretary a financial report signed by its president and treasurer or corresponding principal officers containing the following information in such detail as may be necessary accurately to disclose its financial condition and operations for its preceding fiscal year—
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> (1) assets and liabilities at the beginning and end of the fiscal year;
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> (2) receipts of any kind and the sources thereof;
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> (3) salary, allowances, and other direct or indirect disbursements (including reimbursed expenses) to each officer and also to each employee who, during such fiscal year, received more than $10,000 in the aggregate from such labor organization and any other labor organization affiliated with it or with which it is affiliated, or which is affiliated with the same national or international labor organization;

> (4) direct and indirect loans made to any officer, employee, or member, which aggregated more than $250 during the fiscal year, together with a statement of the purpose, security, if any, and arrangements for repayment;
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> (5) direct and indirect loans to any business enterprise, together with a statement of the purpose, security, if any, and arrangements for repayment; and
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> (6) other disbursements made by it including the purposes thereof;
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> all in such categories as the Secretary may prescribe.

Although LMRDA section 201(b) does not reference reporting obligations for trusts, including a "trust in which a labor organization is interested,"[1] LMRDA section 208 authorizes the Secretary to prescribe forms, rules and regulations, "including rules prescribing reports concerning trusts in which a labor organization is interested" where the Secretary finds it is "necessary to prevent the circumvention or evasion of such reporting requirements." The reference to §3(l) trusts in Section 208 is the sole reference to §3(l) trusts in Title II of the LMRDA ("Reporting by Labor Organizations, Officers and Employees of Labor Organizations, and Employers"). It follows that OLMS' authority to require information regarding §3(l) trusts for purposes of Title II of the LMRDA, including the Secretary's instant proposal, is limited to preventing circumvention or evasion of reporting requirements for labor organizations.[2] Thus, OLMS has been found to exceed its authority under Section 208 where it has proposed §3(l) trust disclosure that goes beyond efforts to prevent circumvention or evasion of Title II reporting obligations and instead seeks to regulate "general trust reporting." *See AFL-CIO v. Chao*, 409 F.3d 377, 378 (D.C. Cir. 2005).

The instant notice of proposed rulemaking ("NPRM") regarding the adoption of the Form T-1 is the latest in a series of efforts by the Department of Labor to create an indirect trust reporting obligation, by promulgating a form that labor organizations would have to file relating to §3(l) trusts with the express purpose of "implement[ing] section 201 of the LMRDA." 73 Fed. Reg. at 11765. The NPRM offers interested parties their second opportunity to comment on Form T-1 proposals since OLMS first proposed a Form T-1 reporting requirement back in December 2002. *See* 67 Fed. Reg. 79280 (December 27, 2002).

THE NCCMP'S INTEREST IN FORM T-1 RULEMAKING

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[1] *See* LMRDA section 3(l), 29 U.S.C. §402(l) (defining a "trust in which a labor organization is interested" as "a trust or other fund or organization (1) which was created or established by a labor organization, or one or more of the trustees or one or more members of the governing body of which is selected or appointed by a labor organization, and (2) a primary purpose of which is to provide benefits for the members of such labor organization or their beneficiaries.") Throughout these comments, a "trust in which a labor organization is interested" will be referred to as a "§3(l) trust."

[2] In the Act's preamble, Congress announced that it enacted the LMRDA "[t]o provide for the reporting and disclosure of certain financial transactions and administrative practices of labor organizations and employers, to prevent abuses in the administration of trusteeships by labor organizations [and] to provide standards with respect to the election of officers of labor organizations…" There is no express intent on the part of Congress to place reporting and disclosure obligations on §3(l) trusts.

While the NCCMP has monitored OLMS' prior efforts to establish a Form T-1, we have opted not to comment in the past. Our decision to refrain from commenting on OLMS' prior proposal was based on a significant limitation OLMS placed on Form T-1 reporting. Taking into account the reporting and disclosure obligations already placed on ERISA covered employee benefit trusts, the Secretary concluded:

> [I]f reports are filed pursuant to . . . requirements of the [ERISA section 103], 29 U.S.C. §1023 . . . or if annual audits are available under Sec. 302(c)(5)(B) of the Labor Management Relations Act, 29 U.S.C. Sec. 302(c)(5)(B) . . . , no form T-1 will be required. The reporting labor organization will be required to state where the specific alternative reports are available for inspection, however.

67 Fed. Reg. at 79283. This limitation addressed our general concern that the Form T-1 would give a federal agency without a statutory mandate or expertise in regulating employee benefit plans the opportunity to place a burdensome disclosure requirement on multiemployer plans covered by ERISA. Without this sensible limitation, any effort to enforce the Form T-1 filing requirement would create an additional administrative burden on multiemployer plans that would adversely impact effective plan administration while providing little or no benefit to the participants and beneficiaries of multiemployer plans, many of whom are not members of labor organizations.

Unfortunately, OLMS has chosen to change course and not include this exemption in its current Form T-1 proposal. As a consequence, many multiemployer plans governed by ERISA[3] that would not have been subject to Form T-1 filing obligations under prior OLMS efforts will now be a target of burdensome Form T-1 reporting obligations. For this reason, the NCCMP and its member funds have a strong interest in urging OLMS to reconsider its current position regarding the inclusion of plans governed by ERISA's reporting and disclosure requirements.

The NCCMP is the only national organization devoted exclusively to protecting the interests of the approximately ten million workers, retirees, and their families who rely on multiemployer defined benefit pension plans 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

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[3]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).

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.

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, the NCCMP's relationship with the EBSA and the IRS is frequently collaborative as much as cooperative.

Similarly, the NCCMP notes 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 and burdensome impact on multiemployer plan administration. Of special concern to the multiemployer plan community at that time 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." Since 2005, it has become apparent that OLMS' efforts to overhaul its decades-old reporting and disclosure enforcement program under Title II of the LMRDA would have a significant impact on multiemployer plan administration. Thus, the NCCMP has been an active participant in subsequent OLMS initiatives including informal guidance and formal rulemaking under LMRDA section 202 (Form LM-30: Report of Officers and Employees of Labor Organizations) and section 203 (Form LM-10: Report of Employers). However, prior to this NPRM, the NCCMP has been largely a spectator with regards to OLMS efforts to establish new rules under LMRDA section 201(b) (*i.e.*, Form LM-2 and Form T-1 proposals).

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. However, OLMS' latest effort to establish a Form T-1, in large part, fails to take into account the predominant role of ERISA in establishing rigorous reporting and disclosure requirements on all employee benefit plans. More troubling still, the NPRM exhibits little understanding of the body of employee benefits law that has developed since 1974 that has drastically altered the regulatory framework governing employee benefit plans. Finally, nowhere in the NPRM will one find any analysis that would indicate a nexus between the financial affairs of ERISA plans and circumvention or evasion of reporting requirements under the LMRDA.

SUMMARY OF NCCMP'S COMMENTS

To the extent OLMS seeks to prescribe reporting and disclosure requirements about employee benefit plans governed by ERISA, OLMS must address the overriding issue of whether the *scope* of disclosure a labor organization will be required to furnish OLMS under the proposed Form T-1 relating to an ERISA governed plan is necessary to prevent union circumvention or evasion of reporting requirements under Title II. It is not enough for OLMS to state that "union members would benefit from 'more information about the financial activities'" of ERISA governed plans.[4] OLMS must show a nexus between reports containing the particular information sought by OLMS in the proposed Form T-1 and the agency's authority to prevent union circumvention or evasion of reporting requirements under Title II.

With respect to this overriding issue and the burden the proposed Form T-1 would place on multiemployer plans, the concerns of the NCCMP and its members are addressed below:

1. <u>OLMS should exempt ERISA Plans from Form T-1 reporting</u>.

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 under Title II of the LMRDA were not intended to regulate employee benefit plans covered by ERISA and that ERISA itself provides such broad transparency regarding covered plans that any collateral interest in plan-related information is more than satisfied under the ERISA reporting and disclosure vehicles. For this reason, the Secretary should exclude ERISA plans from Form T-1 reporting as it had contemplated in the earlier iterations of the Form T-1 reporting regulations..

2. <u>Reinstate the Form T-1 filing exemption in cases where a §3(l) trust is subject to ERISA §103 filing obligations</u>.

In the alternative, OLMS should narrow the scope of trusts for which a labor organization must file a Form T-1 by exempting from a labor organization's Form T-1 filing obligation those trusts that file reports pursuant to the requirements of ERISA section 103 and underlying Department of Labor Regulations.

3. <u>Issues that Require Clarification</u>.

As requested in the NPRM, the NCCMP requests clarification on a number of terms found throughout the NPRM and the proposed Form T-1 and Instructions.

4. <u>The Secretary should exercise her authority under LMRDA §607</u>.

In general, the NCCMP finds that the NPRM, which would place an extraordinary burden on heavily regulated employee benefit plans, suffers from a significant lack of understanding of the existing regulatory framework that governs the administration and operation of these plans. Accordingly, we suggest that before moving forward with any rulemaking that significantly impacts ERISA governed plans, the Secretary consider exercising her authority under LMRDA §607 and seek assistance from those agencies with the expertise to ensure that the concerns raised in this comments are adequately addressed.

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[4] *See AFL-CIO v. Chao*, 409 F.3d at ___.

COMMENTS

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a. Legislative History: LMRA, WPPDA, LMRDA and ERISA

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[5] through ERISA's extensive reporting and disclosure provisions,[6] fiduciary requirements[7] and prohibitions against certain party-in-interest transactions.[8] 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.

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,[9] 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—

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[5]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).

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

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

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

[9]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).

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

The multiemployer plans on whose behalf the NCCMP now comments are the employee benefit plans that meet these requirements.[10] By satisfying these requirements, the assets of these multiemployer plans, as a matter of law, 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. . . ," 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

[10]While most multiemployer plans are Taft-Hartley trusts, not all Taft-Hartley trusts are multiemployer plans. Many Taft-Hartley trusts are established between a single employer and the bargaining representative of that employer's employees.

these plans. Initially, federal regulation of employee benefit plans was established through the WPPDA.[11] 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. 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.[12]

The key report on the reporting aspects of the LMRDA[13] 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).[14] 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.[15] Section 8(b) of the WPPDA further provided that the Secretary of Labor "shall make available for examination" the annual reports filed by plan administrators.[16] 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

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

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

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

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

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

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

benefit] plans."[17] Accordingly, in the early 1970s 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.[18]

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[17]*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.

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

[18]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.

Of course the enactment of ERISA went far beyond mere reporting and disclosure to protect the interests of plan participants and beneficiaries.[19] 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. . . .
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> 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

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[19] In an unusually candid observation which supports the NCCMP's position, OLMS notes that—

> The fiduciary duty of the trustees to refrain from taking a proscribed action has never been thought to be sufficient by itself to protect the interest of a trust's beneficiaries. Although a fiduciary's own duty to the trust's grantors and beneficiaries include disclosure and accounting components . . ., public disclosure requirements, *government regulation, and the availability of civil and criminal process,* complement these obligations and help ensure a trustee's observance of his or her fiduciary duty.

73 Fed. Reg. at 11758(2 n. 3) (emphasis added and citations omitted). Although Form T-1 embraces "public disclosure requirements," only ERISA establishes a regulatory framework governing how trustees must administer ERISA plans and only ERISA provides civil and criminal process where trustees violate their duties as fiduciaries.

> interest of the plan and its participants, that adequate safeguards are provided, and that the exception is administratively feasible.
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> 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.[20]

Read in conjunction, the legislative histories of the LMRDA and ERISA reveal a demarcation between those "dealings" of a labor organization, union officer or union employee that may conflict with their duties to union members, which are reportable under sections 201(b) and 202 of the LMRDA, 29 U.S.C. §§431(b) and 432, and the reporting and disclosure of the "particulars of party-in-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.[21] Indeed, since the late 1950's, the class of individuals protected by the LMRDA has contracted

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

[21] Arguably, the enactment of ERISA may illuminate Congress' intent to give "trust in which a labor organization is interested" under section 3(l) of the LMRDA a narrow and literal meaning. That is, OLMS' authority under Section 208 of the LMRDA may be limited solely to those trusts that are established for the primary purpose of providing benefits to ***members*** of such labor organization or their beneficiaries (for example, strike funds, credit unions, building funds or trust funds established pursuant to a labor organization's constitution to provide death benefits to members). Consequently, trusts established for the express benefit of ***employees of employers*** that contribute to such trusts pursuant to a collective bargaining agreement with a labor organization may not be §3(l) trusts. To determine whether a trust was established primarily for "members of a labor organization" or "employees of a contributing employer" one need only review the document establishing the trust. The declared purpose set forth in most Taft-Hartley trust documents is generally set forth in terms of providing benefits to the employees and beneficiaries of signatory employers. The reason for this is two-fold. First, not all employees of contributing employers are members of a labor organization, and second, section 302(c)(5) of the LMRA limits the exceptions of employer payments to labor organizations to "trust funds established . . . for the sole and exclusive benefit of employees of such employer, and their families, and dependents. . ." It is more than reasonable to question whether Congress ever intended to include LMRA section 302(c)(5) trust funds within the definition of §3(l) trusts under the LMRDA.

significantly while those individuals who are participants or beneficiaries of ERISA plans has increased exponentially.[22]

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. Indeed, where Congress has concluded that there were gaps in ERISA's initial reporting and disclosure requirements, it has not hesitated to close them (*see*, *e.g.*, ERISA sections 101(f), (j)-(m), 204(h), 29 U.S.C. §§102(f), (j)-(m), 1054(h)).

b. ERISA's relevant reporting requirements.

In support of the claim that the Form T-1 proposal is "necessary" within the scope of LMRDA section 208, the NPRM sets forth a number of "examples of improper administration and diversion of funds from §3(l) trusts." 73 Fed. Reg. at 11759(3)-11760(1,2). The NCCMP is under no illusion that employee benefit plans including multiemployer plans are immune to unlawful activities including corruption and racketeering involving organized crime.[23] However, OLMS' conclusion—to wit, if its "proposed rule had been in place, the members of the affected

[22]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).

[23]As discussed above, Congress enacted ERISA in an effort to regulate a sector of the economy where the pooling of vast sums of money subject to third-party or management control left employee benefit plans vulnerable to a host of infirmities, including corruption and theft. (See note 18 above) Congress found this to be the case regardless of whether the plan administrator was "an employer, union official or independent trustee." As a review of EBSA's online "Newsroom" shows, union officials hardly have a monopoly on the market when it comes to unlawful activities involving ERISA plan assets. See, http://www.dol.gov/ebsa/newsroom/main.html. In this regard, federal regulation of employee benefit plans is not unlike federal regulation of banks. Or, in the words of "Slick" Willie Sutton, when asked why he robbed banks, "Because that's where the money is." fbi.gov/libref/historic/famcases/famcases.htm

labor organizations, aided by the information disclosed in the labor organizations' Form T-1s, would have been in a much better position to discover the improper use of the trust funds and thereby minimize the injury to their stake in the trust"—is built on a misplaced confidence in reporting and disclosure alone that Congress flatly rejected over thirty years ago when it replaced the rather toothless enforcement mechanisms of the WPPDA with the comprehensive statutory framework of ERISA.[24]

To establish the "necessity" of its proposal in the case of ERISA plans, we contend that OLMS must show that the unlawful transactions described in its examples would not be subject to disclosure under ERISA's reporting and disclosure provisions. However, each of the examples of wrongdoing listed by OLMS appears to be a "Nonexempt Transaction" that is required to be reported on the Form 5500.[25]

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 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

[24]Since essentially the same information is available to interested parties through ERISA channels, one wonders why OLMS' confidence in the prophylactic impact of forms filed with the Department of Labor does not extend to EBSA filings.

[25]"A Charlotte construction contractor has been hit with $153,000 in penalties and fines and sentenced to one year of federal probation after pleading guilty to filing a false Form 5500." As reported in BenefitsLink, 4/9/2008, at http://benefitslink.com/links/20080409-061235.html

> (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. 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)[26] and (b).[27]

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[26]Under section 408(a), the Secretary 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.

[27]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

Significantly, while the officers and employees of a labor organization may be parties in interest or fiduciaries as to multiemployer plans, there is no distinction under ERISA 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.[28]

(c) 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 labor organizations 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[29] *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

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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).

[28]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).

[29] 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.

> 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 labor organizations for financial transactions involving multiemployer plans blurs the clear line which delineates the labor organization under the LMRDA with the multiemployer plan governed by ERISA. Moreover, while the duty a *union official* or *labor organization* 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 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).[30]

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[30] *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

(d) Related matters.

(i) *The NPRM's characterization of Taft-Hartley funds as "labor organization benefit funds" offends fundamental principles of federal labor law*

We limit the scope of our comments to plans covered by ERISA. The NCCMP leaves issues relating to the proposed Form T-1's impact on those §3(l) trusts that are not ERISA plans to parties with an interest in how those entities are regulated. However, we would like to raise a note of caution regarding some of the terminology found throughout the NPRM that blurs the lines between trusts and other entities that are clearly under the management control of a labor organization and those trusts that are not under the management control of a labor organization. For instance, the NPRM uses the term "labor organization benefit fund" to describe a local union severance fund, a job training fund, a retirement plan, an apprenticeship training fund, a welfare benefit fund and a "joint committee." 73 Fed. Reg. at 11759(3)-11760(1).[31] Some of these entities may be entities under the management control of a labor organization. However, where the NPRM is referring to a jointly-trusteed, Taft-Hartley fund, the NPRM should refrain from using the term "labor organization benefit fund." Clearly, the regulatory and administrative environment has progressed significantly since 1948.

Moreover, OLMS states that the Form T-1 "is designed to provide labor organization members a proper accounting of how their labor organization funds are invested or otherwise expended by the trust." 73 Fed. Reg. at 11758(1). Again, to the extent OLMS is referring to an entity that is under the clear management control of the labor organization, we have no objection to the characterization of an entity as a "labor organization fund." However, where OLMS is referring to funds "whether solely administered by the labor organization or a separate, jointly administered governing board" as "labor organization funds," it suggests a lack of understanding of the body of law governing employee benefit plans. *Id.*

Finally, we strongly disagree with OLMS's characterization of multiemployer plan governance which suggests that employer-appointed trustees will abdicate their authority to their labor counterparts. It is particularly disheartening when the agency forms that opinion solely on secondary sources: two student notes and an article by a practitioner.[32] 73 Fed. Reg. at 11762(1,

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information must do so under §8 of the [WPPDA] by proceeding against the administrator or trustee of the fund. . .").

[31] *See also,* 73 Fed. Reg. at 11758(2) ("the Department's case files reveal numerous examples of embezzlement of funds held by both labor organizations and *their* trusts." (emphasis added)).

[32] The practitioner's article, published a year after ERISA's enactment, provides detailed context to the factors that motivated Congress to enact ERISA. Curiously, while in no position at such an early date to judge the efficacy of ERISA, the author makes a point to criticize the merits of disclosure as a means of protecting plan assets:

> [ERISA] repeals the WPPDA and replaces it with provisions which increase the scope and detail of the required annual financial reports of the Secretary of Labor, including the particulars of all party-in-interest transactions and all large transactions. Recognizing the "disclosure disinfectant" approach has proved ineffective in terms of protecting employee benefit plan assets from self-dealing, imprudent investing, and misappropriation, the new

2).[33] In our experience, employer trustees do not tolerate efforts by labor trustees to "wrest control" of Taft-Hartley plans. There are at least three very sound reasons for this. First, as a practical matter, employer trustees who also contribute to these funds and compete in the marketplace with employers who do *not* contribute to these funds will take an active role in fund administration to ensure that the funds are administered as efficiently as possible. Second, on a personal level, employer trustees who are responsible for a workforce that relies on these funds to provide employees and their families with meaningful retirement benefits or health and welfare benefits, will approach their role as trustee with a strong sense of paternalism. Third, on an understandably selfish level, employer trustees tend to be well versed on how ERISA section 405(a) could impact their lives:

> **(a) Circumstances giving rise to liability**. In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:
>
> (1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;
>
> (2) if, by his failure to comply with [his fiduciary duty under] section 404(a)(1)…in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or
>
> (3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

> act codifies uniform federal fiduciary standards, including a "prudent man" rule, and prohibits plan fiduciaries from engaging in certain prohibited transactions. Breaches of fiduciary duty render the plan fiduciary personally liable for any plan losses occasioned by such breach. Moreover, the Secretary of Labor is give fairly broad investigative authority and the power to file civil actions in federal court to redress breaches of fiduciary responsibility or other violations of Title I of the Act.

Ronald H. Malone, *Criminal Abuses in the Administration of Private Welfare and Pension Plans: A proposal for a National Enforcement Program*, 1 S. Ill. U. L.J. 400, 431 (1976) (footnotes and citations omitted).

[33]Two of the articles address pre-ERISA trustee conduct and the third, a student note, seems to support our position that there is no need for "specific legislation aimed at union controlled funds." Comment, "Exclusive Union Control of Pension Funds: Taft-Hartley's Ill-Considered Prohibition," 4 U. Pa. J. Lab. & Emp. 215, 231 (2001). *Cf., Local 144 Nursing Home Pension Fund v. Demisay*, 508 U.S. 581, 592 (1993) ("Consistently with the text of §302(c)(5), and the structure of §302 in general, we view the 'sole and exclusive benefit' and 'held in trust' provisions of that paragraph as neither creating nor imposing a federal trust law standard, but rather as simply requiring a trust obligation for the specified purposes, defined and enforced originally under state law, . . . *and now under ERISA*. Cf. *Amax Coal, supra*, at 329-330. . . The fiduciaries of the [pension fund] are subject to the fiduciary obligations of ERISA, including the so-called exclusive benefit requirements of [§404(a)(1)(i)], and are liable under [§409(a)] to legal and equitable remedies for failure in those obligations."(emphasis added)).

As a rule, the risk of significant financial liability for another trustee's fiduciary breach is motivation enough for most trustees to take their fiduciary obligation very seriously, whether they are employer-appointed or union-appointed trustees.

(ii) *The NPRM does not cure the defects of prior OLMS Form T-1 proposals which exceeded the Secretary's statutory authority.*

Fifteen months after the D.C. Court of Appeals vacated the agency's 2003 Form T-1 Final Rule,[34] the Secretary issued a second Final Rule, which was vacated by the D.C. District Court. *AFL-CIO v. Chao*, 496 F.Supp 2d 76 (D. D.C. 2007). In the 2006 final rule,[35] OLMS stated that under its latest effort, "the scope of the [Form T-1] reporting requirement has been narrowed to conform with the D.C. Circuit's decision in *AFL-CIO v. Chao*." 71 Fed. Reg. at 57720. In particular, OLMS claimed that "the final Form T-1 rule applies only to those unions that, alone or in combination with other unions, select or appoint a majority of the trustees of the members of the governing body of the section 3(l) trust, or, alone or in combination with other unions, contributed over 50% of the trust's revenue during a one-year reporting period." *Id.* However, as comments filed by the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO Comments") detail, the 2006 final rule and we conclude the structure of this proposed rule do not in fact "narrow" the scope of Form T-1 reporting in a manner that would cure the defects of the original rule. We are in complete agreement with the AFL-CIO Comments.

We submit that the NPRM's filing threshold, which requires Form T-1 filing if a labor organization either has "management control" *or* "financial domination" of the §3(l) trust fails to correct the defects of the agency's initial Form T-1 proposal or its subsequent efforts. The agency's failure rests with its decision to find "financial domination" by a labor organization where it does not exist. Specifically, OLMS continues to attribute employer contributions made to a trust on behalf of union members as contributions made on behalf of a labor organization for purposes of its 50% threshold. *See* proposed Form T-1 Instructions, "Who Must File" (73 Fed. Reg. at 11786).

Moreover, the NPRM's "attribution rule," which would conflate employer contributions made to a Taft-Hartley trust on behalf of its employees pursuant the terms of a collective bargaining agreement with contributions made to that trust by a labor organization, offends the fundamental principles of ERISA and the LMRA by indicating that employer contributions to these trusts are made "on behalf" of labor organizations. ERISA establishes a *uniform* standard of conduct for all fiduciaries of an ERISA plan. For example, ERISA does not set more stringent fiduciary standards for the board of trustees of a multiemployer plan than it does for an employer who administers a 401(k) plan. In each case, however, the fiduciary must "discharge his duties with respect to the plan solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan." ERISA section 404(a)(1)(A). Similarly, LMRA section 302(c)(5) provides that the exemption to the restrictions set forth in

[34]68 Fed. Reg. 58374 (October 9, 2003).

[35]Labor Organization Annual Financial Reports for Trusts in which a Labor Organization is Interested, Form T-1, 71 Fed. Reg. 57706 (September 29, 2006)

LMRA section 302(a) and (b) only apply to trust funds "established…for the sole and exclusive benefit of the employees of such employer, and their families and dependents…"

By equating the contributions an employer makes to a Taft-Hartley trust on behalf of its employees (who are union members) to contributions on behalf of "the labor organization," the proposed rule turns the prohibitions of LMRA section 302 on their head. In short, OLMS has proposed a "rule of attribution" that appears to disregard the exclusive benefit rule—likely the most important legal principle underlying the federal law governing employee benefit plans.

Nor can we find any legal authority that supports OLMS' conclusion that contributions an employer makes to a Taft-Hartley trust on behalf of its employees in accordance with the terms of a contract it negotiates with a labor organization should, in any way, be treated as contributions made on behalf of the labor organization. The fact that an employer's contractual obligation to contribute to an employee benefit plan arises from collective bargaining should not affect how those funds are characterized and should certainly not be taken into account to determine a labor organization's so-called "financial domination" over an ERISA plan.[36] We assume OLMS does not contend that a labor organization has "financial domination" over an employer's 401(k) plan simply because that labor organization agrees that the employer will establish the 401(k) plan for the benefit of the employees the labor organization represents.

(e) Suggested Action

- For purposes of Form T-1 filing, exclude employee benefit plans covered by ERISA.
- As discussed below, in accordance with LMRDA section 607, the Secretary should seek to address concerns OLMS has with ERISA covered §3(l) trusts through a cooperative effort with EBSA and the IRS to modify the Form 5500.

2. <u>Narrow the scope of trusts for which a labor organization must file a Form T-1 by exempting from a labor organization's Form T-1 filing obligation those trusts that file reports pursuant to requirements of the ERISA §103 and underlying Department of Labor regulations</u>.

Prior OLMS efforts to establish a Form T-1 contained an exception for trusts that file reports under section 103 of ERISA (*i.e.*, Form 5500) or make available annual audits meeting prescribed, ERISA-based standards. 67 Fed. Reg. at 79283; 71 Fed. Reg. 57716, 57721 and

[36]In one instance, the NPRM characterizes payments to an apprenticeship fund as "reflecting more collective interests of employees . . . , payments that serve the interests of the labor organization. In such instances, the funds cover expenses that otherwise would be paid from the labor organization's general treasury and reported on the Form LM-2." 73 Fed. Reg. at 11761(2,3). This is a gross mischaracterization of these funds. First, apprenticeship and training funds are ERISA welfare plans (*See* ERISA §3(1)) and are subject to ERISA's exclusive benefit rule, and if contributions to an apprenticeship fund are made pursuant to a collective bargaining agreement, the fund must be established in accordance with LMRA §302(c)(5)'s exclusive benefit rule. But OLMS' characterization of apprenticeship and training funds also overlooks the fact that contributing *employers* have a profound interest in ensuring proper administration of these funds. In fact, it is not unusual for an apprenticeship training fund's underlying trust document to characterize its primary purpose in terms of providing contributing *employers* with sufficient numbers of properly trained workers.

57746 (September 29, 2006). However, "[a]fter further consideration,"[37] OLMS has decided against this exemption. 73 Fed. Reg. at 11765(3). We devote the balance of these comments to this inscrutable revision of the agency's prior position.[38]

(a) The burden of Form T-1 in light of legal obligations of ERISA Fiduciaries

The obligation to file the T-1 is the obligation of a labor organization and not the obligation of a §3(l) trust. Where a §3(l) trust is an ERISA plan, decisions of a plan fiduciary that relate to assisting labor organizations in the preparation of their Form T-1s must be considered in the context of the plan fiduciary's obligations under ERISA. Throughout the proposal little attention is paid to these obligations. In fact, the proposal includes a number of assumptions about the ability of labor organizations to obtain information from funds. However, these assumptions are based on OLMS' seeming lack of familiarity with ERISA plan operations or fiduciary obligations under the law.

In the proposal, OLMS acknowledges that the compilation and recordkeeping burdens for the Form T-1 filing will largely be borne by the funds. *See* 73 Fed Reg. 11754 at 11762(3) and 11767(1). Yet little of the proposal's burden analysis addresses this. The NCCMP is convinced, however, that complying with the unions' information needs in order to complete the Form T-1 would impose a burden on funds far beyond that acknowledged in the proposal. The burden is more than a financial one and cannot be addressed merely by the trust demanding that labor organizations pay the costs associated with compiling the information. Some information will likely not be available within the proposal's deadline for filing, and no amount of rulemaking will make the information available within that time. Assembling information to enable the unions to meet the Form T-1's short filing deadline—a deadline linked to a labor organization's fiscal year with no regard to the fund's plan year and accounting systems—would also impose a logistical burden on funds and their service providers that would very likely result in the

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[37]There is nothing in the NPRM that would indicate that OLMS' about-face was based on comments it received criticizing its original position.

[38]As discussed above, the NCCMP does not object to a Form T-1 requirement in principle and finds the Secretary's prior analysis on the exemption issue reasonable (although we take no position on the substance of the proposed filing):

> The misconception underlying the comments [opposing the Form T-1] is based in the assumption that Form 5500 reports are filed for all section 3(l) trusts. They are not. Some section 3(l) trusts fall outside of the reporting requirements of ERISA. ERISA only covers pension and "employee welfare benefit plans." . . . Where there is overlap between many section 3(l) trusts and ERISA "employee welfare benefit plans," there are also funds in which unions participate that fall outside ERISA coverage, including strike funds, recreation plans, hiring hall arrangements, and unfunded scholarship programs. . . Thus, the Form T-1 fills the information gap confronted by union members who, absent the rule, would be unable to obtain information about a trust comparable to that disclosed by the Form 5500, even though the trust may be used to circumvent or evade LMRDA Title II reporting requirements.

71 Fed. Reg. at 57721(2,3).

disruption of fund operations. Moreover, the proposal requires the disclosure of personal information about fund participants that simply cannot be disclosed by prudent fiduciaries.[39]

The NCCMP submits, based on its own analysis and input from its affiliates, that many plan fiduciaries, after an evaluation of their legal obligations and consultation with fund counsel, will conclude that it would be a breach of their fiduciary obligations to provide some or all of the required information to labor organizations by the proposed deadline. Plan fiduciary obligations are governed by ERISA and not by the LMRDA.

The proposal is based on OLMS' premise that labor organizations dominate these funds even though they may be Taft-Hartley funds governed by ERISA. Consequently, OLMS concludes that "it is unlikely that any participating labor organization should have difficulty in obtaining from the trust the information needed to complete the Form T-1." As discussed elsewhere in these comments, the Department's premise that labor organizations dominate these funds is seriously flawed and contrary to both the LMRA and ERISA. Indeed, we find it ironic that OLMS would propose a rule whereby ERISA plan fiduciaries who cooperate with a union so the union can comply with the rule may act in violation of their fiduciary duty under ERISA by cooperating with the union, notwithstanding the fact that OLMS promotes the Form T-1 filing obligation as having as its aim preventing misuse of plan assets.

A detailed analysis of the burden that would be imposed on funds is being addressed by other comments. *See especially,* "Form T-1 Notice of Proposed Rulemaking Comments of Professor John Lund, PhD" (April 29, 2008).[40] In this section we address the burden in the context of the fiduciary obligations of fund trustees. To do so, we will review the filing process with emphasis on the actions the fund would have to take either alone or through interaction with the labor organizations.

Each labor organization that files a Form LM-2 must determine those trusts that will be subject to a Form T-1 filing obligation. This determination will not always be obvious. The agency assumes that:

> In most cases labor organizations already possess information to determine whether a form T-1 is required for a particular section 3(l) trusts... In some

[39]We are hard-pressed, for example, to find one good reason—let alone one good reason that relates to the prevention of circumvention or evasion of Title II reporting obligations—why detailed information regarding a pension plan's payment of monthly survivor benefits to the spouse of a deceased participant should be posted on the OLMS website. Quite the contrary when one considers the potential harm to such participants by persons who prey on the elderly if such information is made publicly available.

[40]With the invaluable assistance of Professor Lund, the NCCMP prepared a survey distributed to a number of administrators of multiemployer plans. Notwithstanding the time constraints relating to the NPRM's deadline for comments, we received responses from 40 plans. Professor Lund analyzed these responses and prepared a report entitled "On-line survey of self- and third-party administered trusts concerning likely burden of developing Form T-1 data for LM-2 filers under DOL NPRM of March 4, 2008" (April 29, 2008) (hereinafter "Lund Multiemployer Plan Burden Analysis"). The Lund Multiemployer Plan Burden Analysis, which is incorporated into these comments by reference, is attached.

> situations, the Department expects that labor organizations will have to contact the trusts to obtain information about whether the trust's "pooled receipts" from labor organizations constitute a majority of the trust's receipts during a reporting period. The trust can easily determine whether labor organizations have financial dominance by examining their accounting records.

73 Fed Reg. at 11761(3)-11762(1). For many multiemployer plans, this description is entirely inaccurate. Taft-Hartley funds do not have a majority of union appointed trustees, so the "management domination" prong of the proposed test will not apply. Therefore, whether a Form T-1 must be filed for a particular Taft-Hartley trust will depend on the "financial domination" prong of the proposed test, *i.e.*, the labor organization alone, or in combination with other labor organizations, contributes greater than 50% of the trust's ***revenues*** during the one-year reporting period. 73 Fed. Reg. at 11786. As discussed above, the financial domination test is subject to an attribution rule whereby any contributions to the trust on behalf of the labor organization *or its members* shall be considered the labor organization's contributions.

In reality, a labor organization will not know a trust's revenues and will not know what proportion of contributions have been made on behalf of individuals who are members of that labor organization and other labor organizations. It could not meet its reporting obligation without asking the fund. At the same time, the trust will not know which contributions are made on behalf of union members because the trust records would not include this data. Therefore, in order for the trust to measure the 50% revenue threshold for purposes for Form T-1 filing, the trust and the labor organization must exchange records to identify which trust participants are members of the labor organization. In the case of a national, regional or other multi-union plan or even in the case of a single union plan that covers states with right to work laws, this comparison will require significant time. It will also take time to accurately determine the trust's revenues for purposes of this test. As discussed elsewhere in these comments, it is not apparent how OLMS defines a §3(l) trust's "revenues." In addition, depending on the last day of the trust's fiscal year (*i.e.*, "plan year") in relation to the last day of the labor organization's fiscal year, it may not be possible to determine the trust's revenues within the time frame required for Form T-1 filing.[41]

Once the trust receives a request from a labor organization to provide information for purposes of Form T-1 filing, the trust will have to determine whether to provide all, some or any of the requested information. Since ERISA plan assets may only be used to provide benefits or defray the reasonable costs of administering the plan, a trust subject to ERISA cannot pay the cost of promulgating this information. *See* ERISA sections 403(c)(1) and 404(a)(1)(A). Under ERISA, only the Trustees may authorize providing the information to the labor organization.[42]

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[41]As noted elsewhere in these comments, although the proposal refers to contributions made on behalf of union *members*, the FAQs refer to contributions made pursuant to a collective bargaining agreement to which the union is a party. This was also the position taken by an OLMS representative during a presentation on this proposal.

[42]Similarly, under generally accepted accounting principles ("GAAP"), employers that sponsor defined benefit plans must report on their plans' unfunded liabilities in specified ways. The SEC requires employers with publicly traded stock to prepare financial statements that comply with GAAP.

Accordingly, the labor organization requesting the information must be charged for the cost of compiling and providing the information. Unless the trust charges the entire cost of developing the Form T-1 data to the first requester, the trust will have to determine the number of Form LM-2 filers so that costs associated with the request can be pro-rated, billed and collected. This may or may not be difficult to determine depending on how many labor organizations are considered to have created or established the trust or how many labor organizations appoint or select trustees. As discussed elsewhere in these comments, both of these criteria are ill-defined under the proposed rule and require additional clarification.

Because the time frame to provide the T-1 data is so short—depending on the end of the trust's plan year in relation to the end of the labor organization's fiscal year—if the information is to be timely provided, the trust will likely have to expend plan assets before it is reimbursed by the labor organizations requesting the information. If the trust performs a cost analysis for providing Form T-1 information, then advises the requesting labor organization(s) of the cost entailed, and in accordance with its obligations under ERISA, requires the labor organization(s) to pay prior to its furnishing the information, there may not be time to develop and provide the data by the proposed Form T-1 filing deadline. Even doing that cost analysis would divert the fund's manager and accountant from their fund management responsibilities.

In fact, the trust may not have its costs associated with providing Form T-1 information fully reimbursed for many months. If, for example, there are multiple labor organizations with different fiscal year requesting information, these labor organizations will request information and then be billed by the trust at different times throughout the year. As a result, the trust will have expended plan assets for the benefit of ERISA parties in interest, and a substantial amount of the trust's incurred costs may remain unpaid for some time. If this amount has not been fully reimbursed before the end of the trust's plan year, the outstanding amount may have to be reported as a prohibited transaction on the form 5500. A trust could start working on promulgating required information in advance of a labor organization's request, but this advance work would only extend the time that plan assets will have been expended and not reimbursed for the benefit of a party in interest, thus making it more likely that a prohibited transaction will have to be reported.

Plan fiduciaries may determine that the trust cannot lawfully provide all or some of the requested information. Merely obtaining reimbursement from the requesting labor organizations does not necessarily resolve the fiduciary issues. The timing of this filing will place an extraordinary burden on plan staff over a short period of time. For example, if the plan's fiscal year is the same as the union's fiscal year there will be no more than 90 days to generate the information. Assuming the plan has identified the labor organizations for which the plan is a §3(l) trust, the fund must then determine if there is "financial domination" by labor organizations.

In order to determine if contributions were made on behalf of "members" or under collective bargaining agreements, the trust will need financial information that may be

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Nevertheless, the Department of Labor is clear that pension plan assets cannot be used to pay for the calculations needed to meet those accounting obligations. *See e.g.*, Hypothetical Fact Pattern 2, Guidance on Settlor v. Plan Expenses, at http://www.dol.gov/ebsa/regs/AOs/settlor_guidance.html#section6

unavailable within 90 days of the end of a labor organization's fiscal year. Depending on the Department's clarification of the meaning of the terms "revenue" and "contributions made on behalf of the labor organization or its members," the fund will have to identify union members to ascertain the amount of contributions made on their behalf.[43] The trust may also have to identify and exclude contributions to the trust that were not made pursuant to a collective bargaining agreement to which a labor organization is a party. These excluded contributions may include contributions made pursuant to participation agreements between the trust and an employer, contributions made by operation of law or pursuant to statute, or elective deferrals to 401(k) plans, 403(b) programs and cafeteria plans.

A defined benefit pension plan must also prepare and submit the plan's certification of funding status now required under the Pension Protection Act of 2006 (PPA) within 90 days of the end of the plan's fiscal year. If a labor organization's fiscal year ends at the same time as the fiscal year of the defined benefit pension plan, the Form T-1 and the PPA funding certification would be due at the same time. This will place extraordinary burdens on these plans.

The board of trustees of a multiemployer Taft-Hartley trust must evaluate whether the effort required to compile and provide the Form T-1 information will place a burden on the trust for which financial reimbursement will not compensate. That is, the trustees may determine that providing this information is so burdensome, that they cannot justify providing it in light of their overarching obligation to ensure that expenditures of plan resources be used for the exclusive purpose of providing benefits to participants and their beneficiaries or defraying the reasonable expenses of plan administration.

Moreover, plan fiduciaries of NCCMP affiliated pension funds have expressed deep reservations regarding the proposed Form T-1 requirement that would compel these funds to disclose the names, addresses and amounts of pensions paid to retirees and their surviving beneficiaries. Bound by ERISA to act solely in the interest of participants and beneficiaries of the fund (*i.e.*, not take into consideration a participant's status as a union member), these fiduciaries may be compelled to deny request for this information. The Department of Labor advises that the requirements that a fiduciary act solely in the interest of, and for the exclusive purpose of providing benefits to, participants and beneficiaries prohibits a fiduciary from subordinating the interests of participants and beneficiaries to unrelated objectives. *See,* DOL Reg. §2509.94-1.

NCCMP affiliates do not see how participants and beneficiaries of ERISA-governed plans can derive any benefit from the disclosure of their personal information through the OLMS website. The availability of this information would leave these retirees and beneficiaries subject to solicitation or identity theft by unscrupulous individuals who could easily obtain the name, address and specific financial information concerning these individuals. As one plan fiduciary explained, many participants would view the disclosure of this information by the pension fund's trustees as a "breach of faith." Based on input we have received from affiliates, we believe that a substantial number of pension funds will refuse to provide individual pension disbursements to

[43]We assume "made on their behalf" means "made with respect to their service". If the Department wants an accounting based on the benefits paid to or for union members by collectively bargained employer contributions, there is no way short of a forensic investigation that that information could be produced.

the filing labor organization. The protection of these participants and beneficiaries is not the labor organization's duty, but it is the duty of the fund trustees. Indeed, when Congress amended ERISA in 2006 to expand the information the multiemployer plans must make available to participants, beneficiaries, their unions and contributing employers, it specifically banned the release of "individually identifiable information regarding any plan participant, beneficiary, [or] employee…" ERISA section 101(k)(2)(C)(i), 29 U.S.C. §1021(k)(2)(C)(i).

If the Department wishes to use its enforcement budget to force the disclosure of personal information about retirees and their widows and widowers, who are often elderly and vulnerable, it will likely find itself confronted by fiduciaries of many plans who are willing to take on that challenge. Disclosure of Protected Health Information (PHI) is, of course, specifically prohibited by HIPAA, so health funds could not allow labor organizations to report on the individuals for whom claims are paid. But the health care providers that funds pay directly might also object to publication of claims data without the patients identified, since it could be analyzed in the market to discern detailed information about their finances and business operations.[44]

(b) Much of the information sought by OLMS is duplicative of the information an ERISA Plan already provides the Department of Labor in its Annual Report. Nevertheless, the NPRM proposes a filing deadline that conflicts with the deadline established by Congress for filing the Annual Report.

A comparison of the proposed Form T-1 and Instructions with the Form 5500 Annual Report of Employee Benefit Plan will show that virtually every field and schedule on the proposed Form T-1 has a rough counterpart on the Form 5500. By the agency's own admission, the two forms "overlap." 73 Fed. Reg. at 11766(1). However, as explained in the NPRM, "the Form T-1 must be filed within 90 days of the end of the labor organization's fiscal year and must cover the section 3(l) *trust's most recent fiscal year, i.e.*, the fiscal year ending on or before the closing date of the labor organization's own fiscal year. . . [while t]he Form 5500 is not due… until the end of the seventh month following the end of the plan's fiscal year, with an available extension of up to an additional two and one half months. In the case of a labor organization and a section 3(l) trust that have the same fiscal year, the Form T-1 would be due well in advance of the Form 5500 due date." *Id.* While OLMS contends that this "deadline conflict" is a factor *supporting* its change of heart regarding the Form 5500 exemption, we find it a most compelling reason to reinstate the exemption.

Frankly, we are baffled by the proposal's seeming disregard for long-established statutory deadlines. Did OLMS consider whether ERISA's drafters had a reason for establishing a filing deadline for employee plan annual reports seven months after the end of a *plan's* fiscal year? Did OLMS consider the implications of a Form T-1 that would require a labor organization to obtain information from an ERISA plan four to six months before the plan would or, in most

[44]In addition to making sure that the expanded multiemployer plan disclosures required by PPA do not include individually identifiable information, Congress also stipulated that hose materials "shall not—reveal any proprietary information regarding the plan, any contributing employer, or entity providing services to the plan." ERISA section 101(k)(2)(C)(ii), 29 U.S.C. §1021(k)(2)(C)(ii).

cases, could provide the very same information to the Department of Labor and the IRS?[45] We submit that the proposed Form T-1 deadline undermines the statutory deadline Congress carefully crafted when it enacted Section 104 of ERISA.

ERISA Section 104(a)(1) requires that a plan file an annual report "within 210 days after the close of such year (or within such time as may be required by regulations promulgated by the Secretary in order to reduce duplicative filing)." 29 U.S.C. §1024(a)(1). The legislative history of ERISA illustrates that by this statutory provision—particularly the parenthetical language "in order to reduce duplicative filing"—the drafters intended to reduce filing of the same or similar trust information with various federal agencies. Specifically, the Conference Committee in its Joint Explanatory Statement of the draft bill agreed upon in conference explained that the annual report was to be filed within 210 days of the close of the plan year "or within such period of time as the Secretary of Labor may require in order to reduce the necessity for duplicate filing *with the Internal Revenue Service.*" (emphasis added). Employee Retirement Income Security Act of 1974—Joint Explanatory Statement of the Committee of Conference, reported in Legislative History of the Employee Retirement Income Security Act of 1974 (Pub. Law. 93-406), at 4524.

Further, not only does the above-quoted statutory provision and legislative history evidence congressional intent to avoid duplicative filing of trust information generally, but Section 104(a)(1) also directs the Secretary of Labor to consider the annual report filing deadlines of other governmental agencies when selecting its own filing deadlines to reduce unnecessary duplication. By setting the filing deadline for the proposed Form T-1 far before the deadline 210-day deadline for filing for the Form 5500, the Secretary is requiring the filing of much of the same trust information already required to be filed, but on an entirely different schedule. This runs counter to the expressed congressional intent to reduce duplicative filing.

3. <u>Issues that Require Clarification</u>.

A number of confusing and ambiguous provisions found throughout the NPRM add to the difficulty of accurately evaluating the burden of compliance. Some of this confusion may be the result of OLMS' lack of familiarity with and therefore, misunderstanding of employee benefit plans and their administration. This lack of understanding pervades the proposal, exemplified by the core premise that labor organization domination of a fund should be determined by attributing employer contributions made on behalf of its employee who happens to be a union member as a contribution made on behalf of the member's union. That issue is addressed in detail elsewhere in these comments. This section will focus on specific confusing terms found throughout the NPRM, which affects the ability of funds to evaluate the burden and would certainly affect the ability of funds to prepare and provide the information required for Form T-1 filing.

We have examined the Frequently Asked Questions (FAQs) posted on the agency's website following the issuance of the 2006 version of the proposed rules. Since the current proposal is, in many respects, identical or very similar to the 2006 rules, the agency's views expressed in the FAQs should be relevant. However, it is not clear whether the agency expects

[45]By filing a timely Form 5558 with the Department of Labor and IRS, ERISA plans will receive a 2½ month one-time extension to this deadline.

the positions set forth in the FAQs to apply to the current proposal. Therefore, where relevant, we have consulted the FAQs as evidence of OLMS's interpretation of terms used in the proposal.

(a) "Trust in which a labor organization is interested" or "§3(l) trust"

A trust in which a labor organization is interested, for purposes of the LMRDA and this proposal: (1) "is created or established by a labor organization or a labor organization appoints or selects a member of the trust's governing board;" and (2) "has as a primary purpose to provide benefits to members of the labor organization or their beneficiaries."

In order to apply this basic definition some terms must be clarified as follows:

- ***created or established***. It is generally understood in the employee benefits community that a trust is created by the parties to the trust agreement. Therefore, the use of these terms seems to provide that the labor organization(s) that adopted the trust agreement creating the plan is the labor organization(s) that created or established the trust. Based on the common understanding of such trusts we assume that a labor organization that bargains with an employer to participate in an already established and operating trust would not be considered to have created or established the trust. When a plan merges into another plan, we understand that the merging plan ceases to exist.

  In the FAQs, the agency did not address this issue directly. However, one FAQs states that "If a local union selects one or more of the trustees of any such trust *or if it established any such trust (for example, if the trust was established pursuant to a collective bargaining agreement the local made with an employer)*, . . . the local would have to file a Form T-1 for the trust." (emphasis added) This implies that the union need not have adopted the trust but only that the trust was "established pursuant to a collective bargaining agreement" the union made with an employer.

  This interpretation could require T-1 filing with respect to single employer plans operated unilaterally by corporations, which are apparently not the objects of the concerns OLMS expressed as justification for this proposal. For example, if, as in the automobile, steel, telecommunications, utilities, publishing and many other industries, a labor organization bargained with a single employer for the creation of a plan for the employees represented by the labor organization, or for those represented employees to be covered by an existing plan of that employer, but the labor organization was not party to the trust, nor appointed trustees, the trust would be a §3(l) trust required to be reported by that labor organization if the required percentage of the trust's revenues were contributions made on behalf of the members of that union and others that represent groups working for that employer pursuant to the labor organization's collective bargaining agreement with the employer. This could include plans that the labor organization would have little ability to influence in any respect let alone dominate.

  Therefore, the proposal should be clarified that a labor organization creates or establishes a trust when it is party to the trust agreement that creates the trust.

- ***appoints or selects a member of the trust's governing board***. The FAQs provide explanations that make sense if in fact the OLMS intends to apply them to the current proposal. Generally, the FAQs take the position that the labor organization that selects or

appoints is the labor organization that has the *authority* to appoint a member to the trust's governing board and appoints pursuant to that authority. Without the interpretive gloss provided by the FAQ, however, this test would also be unclear.

(b) "Contributes revenues to the trust that exceed 50% of the trust's revenues during the trust's fiscal year….Contributions made on behalf of the labor organization or its members shall be considered contributions by the labor organization."

- ***Revenue.*** The proposal includes no definition of revenue, and our consultation with various financial professionals has not provided a general consensus on what the agency means by this term. Accounting professionals have provided slightly different interpretations of what constitutes "revenue" but it appears to include—contributions, interest and liquidated damages charged for delinquent contributions, all investment income, realized gains,[46] grants, rents, reimbursements and other income, grants and employee elective deferrals to 401(k) and cafeteria plans. Since the meaning of this term is central to the issue of labor organization "dominance" under the proposal, the proposal must include a more precise definition of the calculation to be performed.

  The FAQs refer to "revenue" but merely repeat the provision in the prior proposal (which is very similar to the provision in the current proposal) and do not define the term. This is a major omission that will affect the ability of labor organizations and plans to determine if a T-1 filing is required.

  The proposed Form T-1 requires the reporting of "receipts" in item 23. The Instructions to the proposed Form direct the filer to include "*for example*, interest, dividends, rent money from the sale of assets, and loans received by the trust." It is not clear if receipts and revenue are considered to be the same.

- ***contributions made on behalf of the labor organization or its members***. The proposal repeatedly refers to contributions made on behalf of "members," but the FAQs refer to contributions made pursuant to a collective bargaining agreement. The two are very different and result in different recordkeeping and compilation issues and that will lead to very different results. Plans do not maintain records of labor organization membership. Moreover, it is unlawful to use labor organization membership as criteria for benefits from an ERISA plan. A trust would have to compare its records with the labor organization(s) to determine which participants are labor organization members and then apportion the contributions and other income as well.

  Contributions to some trusts are not made pursuant to collective bargaining agreements to which the labor organization is a party. Many funds receive contributions made pursuant to participation agreements between the fund and an employer. Independent funds co-sponsored by locals of the same international union often transmit contributions they receive from local employers based on people temporarily working in their jurisdictions to those workers' "home" funds, pursuant to reciprocity agreements between two or more funds.

[46]We have received differing opinions from accountants on whether "revenues" would include unrealized gains.

Some funds receive contributions made by operation of law or pursuant to statute. Elective employee contributions to 401(k) plans and cafeteria plans are not made pursuant to collective bargaining agreements. Based on the proposal and the FAQ, it appears that none of these categories of contributions would be included for purposes of the financial domination test.

Since the meaning of this term is central to the issue of labor organization "dominance" under the proposal, the proposal should clearly state which contributions are to be taken into account for Form T-1 filing purposes. This inconsistency is a major problem that would affect the ability of labor organizations and plans to determine if a plan will be the subject of a labor organization's Form T-1 filing obligation. The fact is, the more lines that are drawn distinguishing between types of income, revenue and contributions that are and are not included, the more complex and therefore the more burdensome the determinations would be. On the other hand, unless the rules limit the reporting to information that is "necessary to prevent the circumvention or evasion" of labor organization reporting requirements, they will exceed OLMS' authority.

The final rule should set forth the status of employees' pre-tax contributions, made through salary reduction and forwarded to the plan by the employers. It is not clear from the proposal how employees' elective contributions to 401(k) plans or cafeteria plans are to be treated. One FAQ seems to provide that amounts collected from employees by a labor organization and forwarded to a trust are "contributions." However, the labor organization does not collect or forward elective contributions to employee benefit plans. Elective contributions are treated by EBSA as employee contributions but by the IRS as employer contributions. Elective employee contributions are made at the individual choice of the plan participant under the terms of the plan, not at levels dictated by a collective bargaining agreement.

(c) The Proposed Form and Schedules.

· ***How to Report Amounts subject to Shared Services Arrangements***. Many plans that may have information that a labor organization would need to complete Form T-1 are parties to shared services arrangements, which significantly affect the amount of receipts and disbursements and to which trust amounts are attributed. These arrangements are specifically permitted by Prohibited Transaction Class Exemption 76-1, 41 Fed. Reg. 12740 (Mar. 26, 1976) (As corrected by 41 Fed. Reg. 16620, April 20, 1976) (referred to as "PTCE") issued by EBSA. Pursuant to such arrangements, employee benefit plans may share office space and/or administrative services with related plans or parties in interest. In issuing the PTCE, the IRS and DOL made specific determinations that the arrangements permitted by the PTCE were administratively feasible, in the interests of plans and of their participants and beneficiaries and protective of the rights of participants and beneficiaries of plans.

The PTCE permits a plan to "secure office space and administrative services jointly with a participating employee organization, employer, or employer association, or with another multiple employer plan which is a party in interest or disqualified person with respect to the plan, and will share the costs of securing such office space or administrative services on a pro rata basis with respect to each party's use of such space or services." The PTCE also permits such a plan to "secure for its own use office space or administrative services, and … furnish part of such office space or administrative services to a participating employee organization,

employer, or employer association, or to another multiple employer plan which is a party in interest or disqualified person with respect to the plan." For purposes of these comments we refer to all such arrangements as "shared services arrangements" although some arrangements may involve only shared office space.

These long standing arrangements work well and are accounted for in plan audit reports and filings required by ERISA. However, because the Form T-1 rulemaking evidences OLMS' lack of familiarity with the operations of employee benefit plans that may be the subjects of Form T-1 filing, it is not clear how receipts and disbursement under such arrangements are to be reported.

For example, it is common for employers to submit contributions to related plans on a single check. One of the plans typically acts as the depository and the contributions are promptly allocated to the other trusts based on the each trust's contribution rate. For purposes of Form T-1, how is this transaction to be reported? Should each trust report only its allocated portion of the receipt? Should the fund that acts as the depository report the full receipt and then the disbursements to the other funds? If so, this will result in double counting a large portion of employer contribution receipts since the full amount received will be reported as a receipt to the depository fund and then again for the fund to which it is allocated.

If such funds rent space, one fund will typically pay the rent and then a proportional share based on usage is allocated to the other funds. The most accurate way to report this is to report the allocated expenditure for each fund. To count the amount expended by the renting fund and also the allocable portion would double count a large portion of the rent.

The same issue will arise with respect to some disbursements to trust officers. For example, one fund will reimburse to a trust officer expenses incurred for attending meetings and the total amount will be allocated among the funds on which the officer serves. Unless the allocated amount only is reported, this will result in double counting the amount reimbursed to the officer.

Since an expressed goal of the Form T-1 is accurate disclosure, it would seem that only the allocable portions of shared receipts or disbursements should be reported; however, the form itself would seem to require double counting of such shared receipts and expenses. The audit reports filed with the Form 5500 make the appropriate adjustments and reflect the amount actually paid for such services or actually received in contributions.

The proposal invites comments on whether the trust's EIN should be reported in the Form T-1 to permit members to crosscheck the information on the Form T-1 with other reports submitted by the trust such as the Form 5500. In fact, it is the format of the Form T-1 reporting that would result in inaccurate reporting and create apparent discrepancies if compared to the Form 5500. We believe this would not provide meaningful information to participants. If these plans are to be the subject of Form T-1 reporting, OLMS will need to give more thought to reporting receipts and disbursements under shared services arrangements and provide instructions.

- ***officers and employees of the trust***. Schedule 3 to Form T-1 requires the reporting of disbursements to officers and employees of the trust. We note that the previous FAQs provide:

Q. How does DOL define an officer or an employee of a trust?

A. There is no statutory definition. The union should rely on the trust to identify what it considers to be officers. All individuals employed by a trust in which a labor organization is interested are "employees," regardless of whether, technically, they are employed by the trust, by the trustees, by the trust administrator, or by trust officials in similar positions.

Typically, an employee benefit trust has two officers identified in the trust. Therefore, if the position expressed in the FAQs remains in effect, most trusts will report disbursements to the identified officers. However, the explanation in the FAQs concerning "employees" of the trust is not clear. Most individuals preparing information for the Form T-1 would assume that an employee is an individual employed by the trust to whom the trust pays wages or a salary and to whom the trust issues a Form W-2. The FAQs do not identify trust employees based on whether individuals perform services for a trust. Based on the above language, an individual employed by an employer trustee in connection with the trustee's business that is unrelated to the trust, could be considered an "employee of the trust." The same could be said, perhaps, of employees of the trust's law firm, auditor, benefit consultant, investment managers and other service providers. Under ERISA, "administrator" is a defined term, and it is not clear if the reference to "trust administrator" in the FAQ refers to the "administrator" as defined by ERISA. Finally, we will not hazard a guess as to the meaning of the phrase "or by trust officials in similar positions."

In the case of shared services arrangements discussed above, one of the trust funds acts as the employer; each fund then pays its proportional share of the employee costs based on the time spent by the staff for each sharing trust. Based on common understanding the trust that actually employs the employees would report disbursements and other trusts would report the payments to the employer trust for staff services. However, based on the FAQ it is not clear if OLMS expects each trust participating in such an arrangement to report the portion of the salary allocated to that trust. If benefit-plan data is to be reported on, this must be clarified in the final rules.

4. <u>The Secretary Should Exercise Her Authority Under LMRDA §607</u>.

In general, the NCCMP finds that the NPRM, which would place an extraordinary burden on heavily regulated employee benefit plans, suffers from a significant lack of understanding of the existing regulatory framework that governs the administration and operation of these plans. Accordingly, we suggest that before moving forward with any rulemaking that significantly impacts ERISA governed plans, the Secretary consider exercising her authority under LMRDA §607 and seek assistance from those agencies with the expertise to ensure that the concerns raised in this comments are adequately addressed.[47]

[47]LMRDA section 607 (Other Agencies and Departments), 29 U.S.C. §527, provides in relevant part:

> In order to avoid unnecessary expense and duplication of functions among Government agencies, the Secretary may make such arrangements or agreements for cooperation or

CONCLUSION

We appreciate the opportunity to share our views on the proposed NPRM and the implications for multiemployer plans that this proposal imposes and would welcome the opportunity to further explain, answer questions raised in these comments and/or amplify our comments in the event the OLMS offers an opportunity for oral testimony as it proceeds. Should that occasion arise, please feel free to contact the undersigned at (202) 756-4644, or by e-mail at rdefrehn@nccmp.org.

Respectfully submitted,

Randy G. DeFrehn
Executive Director

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mutual assistance in the performance of his functions under this Act and the functions of any such agency as he may find to be practicable and consistent with law. . .