



TOPIC:

New DOL Form T-1 Imposes Significant Burdens for Funds**EXECUTIVE
SUMMARY:**

ON MARCH 4, 2008, THE OFFICE OF LABOR MANAGEMENT STANDARDS REISSUED PROPOSED REPORTING REQUIREMENTS FOR UNIONS CONCERNING TRUSTS IN WHICH THE UNION IS INTERESTED. THIS IS THE THIRD SUCH PROPOSED REQUIREMENT, HAVING BEEN STRUCK DOWN TWICE BEFORE BY THE COURTS. IT DIFFERS IN SUBSTANCE FROM THE EARLIER VERSIONS MOST SIGNIFICANTLY BY ELIMINATING THE PROVISION CONTAINED IN THE EARLIER VERSIONS THAT INFORMATION REGARDING FUNDS WHICH FILE FORM 5500 WOULD BE EXEMPT FROM ITS REQUIREMENTS.

THIS EDITION OF *MULTI-ELERT* EXAMINES THE IMPLICATIONS FOR MULTIEMPLOYER FUNDS OF THIS PROPOSAL WHICH APPLIES ONLY TO FUNDS THAT ARE “DOMINATED” BY THE UNION(S), BUT WHICH DEFINES SUCH DOMINATION BY RECASTING EMPLOYER CONTRIBUTIONS MADE PURSUANT TO COLLECTIVE BARGAINING AGREEMENTS AS UNION CONTRIBUTIONS. WHILE THE OBLIGATIONS FOR REPORTING FALL ON THE UNIONS, THE RESPONSIBILITY FOR PROVIDING THE POTENTIALLY MASSIVE INFORMATION NEEDED RESTS WITH THE FUNDS, RAISING QUESTIONS OF: WHETHER PROVIDING SUCH INFORMATION VIOLATES ERISA’S FIDUCIARY REQUIREMENTS; AND HOW THE COSTS OF SUCH ACTIVITIES SHALL BE PAID. ***WE STRONGLY ENCOURAGE FUND TRUSTEES AND ADVISORS TO REVIEW THESE REQUIREMENTS FOR THEIR OWN FUNDS AND FILE COMMENTS WITH OLMS CONCERNING THE APPROPRIATENESS OF PROVIDING THE REQUESTED INFORMATION TO A PARTY IN INTEREST (THE UNION); AND THE BURDEN IMPOSED ON FUNDS BY THE FORM T-1 (DISCUSSED IN DETAIL IN THE ATTACHED).***

PURPOSE:

REQUEST FOR ASSISTANCE IN FILING COMMENTS

CATEGORY:

PROPOSED REGULATION

ISSUER:

**EMPLOYMENT STANDARDS ADMINISTRATION, OFFICE OF LABOR
MANAGEMENT STANDARDS, U.S. DEPARTMENT OF LABOR**TARGET
AUDIENCE:**FUND TRUSTEES AND PROFESSIONAL ADVISORS, ALL TRUST FUNDS
“IN WHICH A LABOR ORGANIZATION IS INTERESTED”****INPUT REQUESTED:****COMMENTS TO OLMS; AND INPUT TO NCCMP FOR ITS COMMENTS**OFFICIAL COMMENT
PERIOD ENDS:**MAY 5, 2008**

NCCMP DEADLINE:

APRIL 25, 2008FORWARD
COMMENTS TO:**Multi-elert@nccmp.org**

REFERENCE:

VOLUME 8, ISSUE 2FOR ADDITIONAL
BACKGROUND SEE:**FEDERAL REGISTER, TUESDAY, MARCH 4, 2008, PART III, DOL
LABOR ORGANIZATION ANNUAL FINANCIAL REPORTS; PROPOSED RULE
(ATTACHED)**

DOL PROPOSED NEW UNION REPORTING REQUIREMENT FORM T-1: IMPLICATIONS FOR MULTIEMPLOYER BENEFIT PLANS

Background

The Office of Labor-Management Services (OLMS), a division of the Employment Standards Administration (ESA) of the U.S. Department of Labor, administers the 1959 Labor-Management Reporting and Disclosure Act (LMRDA). Since 2001, it has re-issued reporting forms and guidance, dramatically increasing the detail required to be reported on the financial affairs of labor organizations, their officers and employees, and businesses that have dealings with them – LM-2, LM-10, LM-30.

This has been highly controversial and heavily litigated. Regulations adopted in 2003 and 2006 to require unions to report on “trusts in which a labor organization is interested” (T-1 trusts) were struck down by the courts, first on substantive and then on procedural bases. On March 4, 2008, OLMS published its latest proposal. It is similar in most regards to the earlier regulations, with one major difference that is relevant here: employee benefit plans that file Forms 5500 would have been exempt from the regulations that the courts rejected, but they are included in the latest version.

What Trusts Are Affected?

A T-1 trust, as defined in section 3(l) of the LMRDA, is one that:

- (1) was created or established by a labor organization *or* a labor organization appoints a member of its governing board, and
- (2) has a primary purpose to provide benefits (including pension and welfare benefits) to the union’s members, and
- (3) the union, alone or together with other unions, either –
 - ◆ Appoints a majority of the trust’s governing board or
 - ◆ Contributes more than 50% of the trust’s annual “revenues”. For this purpose, contributions made by or on behalf of the unions and employer contributions made pursuant to a collective bargaining agreement negotiated on behalf of union members are treated as union contributions. *This is characterized in the proposal as evidence of the union’s financial domination and control of the trust.*

HELP US HELP YOU!

In order for the NCCMP to present the best case in our comments regarding the extent of the burden that will be placed on plans to develop the data requested in the T-1, we need your help!

Please complete the on-line questionnaire you can access through the link found at the end of this edition of Multi-Elert no later than Friday, April 25.

“...employer contributions made pursuant to a collective bargaining agreement negotiated on behalf of union members are treated as union contributions...”

T-1 trusts will primarily be Taft-Hartley funds (both multiemployer and single employer) but will also include union staff plans and local union officer and employee plans and may extend to employer-run funds covering union-represented employees if “created or established by a labor organization” is interpreted to include plans maintained pursuant to collective bargaining agreements as has been represented by OLMS.

Since funds do not base benefits on union membership, it is doubtful that the funds could identify union members from their records and could not determine if 50% of revenues are received on behalf of the union or union members as required to determine if a T-1 must be filed, however, following the reasoning set forth recently by a representative of OLMS that domination is established through the fact that

contributions to the plan are required to be made pursuant to a collective bargaining agreement negotiated by the union, the identification of contributions made on behalf of union members may not matter.

What Must Be Reported?

The trust's:

- ◆ Total assets and liabilities, receipts and disbursements
- ◆ Certain transactions (e.g., below-market loans to union officers or employees, liability write-offs, acquisition or disposition of property other than by purchase or sale)
- ◆ A list of each individual or entity *from* which the trust received \$10,000 or more during the reporting period (each individual receipt of \$10,000 or more must be reported separately and amounts less than \$10,000 are reported if they exceed \$10,000 in the aggregate for an individual or entity).
- ◆ A list of each individual or entity *to* which the trust paid \$10,000 or more during the reporting period (each individual disbursement of \$10,000 or more must be reported separately and amounts less than \$10,000 are reported if they exceed \$10,000 in the aggregate for an individual or entity).

For each listed receipt or disbursement a separate “schedule” is required that must list the name and address of the payer or recipient, type of business or job classification of the entity or individual, the purpose of the receipt and the date. These schedules will require the listing of employer contributions received. These would include payments pursuant to withdrawal liability obligations, delinquencies and settlement of lawsuits in addition to routine contributions. Pension funds will also have to report benefit payments to individual pensioners if either an individual payment or the aggregate payments to the same pensioner within the year exceed \$10,000 for that individual. Welfare funds will have to report payments to individual health care providers and, possibly, de-identified claims reimbursements to participants and beneficiaries. It is not clear how to report receipts and disbursements pursuant to shared service arrangements.

A separate schedule requires information concerning the “officers” of the trust whether or not there are any reportable transactions involving these officers. Who are considered officers of the trust is not clear. A union must report all direct and indirect disbursements to all officers of the trust and to all employees of the trust who receive more than \$10,000 in salaries, allowances and other direct and indirect disbursements. This would require reporting specific salaries, expense reimbursements and benefits for virtually all employees of the trust.

There is a provision for filing an abbreviated T-1 Form if the fund is audited and the audit is attached to the T-1 filing. However, the information required to be included in such an audit in order to qualify to file the abbreviated form is substantial. It appears that the fund audits used for 5500 filing purposes would not be sufficient. In addition, in most cases, the audit could not be completed in time to file with the T-1 Form.

Because the information to be filed must be assembled outside the normal operations of the funds, the unions would have to pay the extra cost of assembling the information that they need for the filing, just as employers must pay directly, rather than with plan assets, for FASB and similar calculations.

What about participants' privacy?

The proposal includes Special Procedures for Reporting Confidential Information but the information that can be shielded is limited. The following can be excluded from the schedules if the unions can demonstrate that disclosure would be adverse to the unions' or trust's legitimate interests.

- Information that would identify salts.
- Information that would identify a union’s prospective organizing strategy. (However, absent unusual circumstances information about past organizing drives, such information will not be treated as confidential.)
- Information that would provide a tactical advantage to parties with whom the reporting union is or will be engaged in contract negotiations. (However, absent unusual circumstances information about past contract negotiations, such information will not be treated as confidential.)
- Information about a settlement that is protected by a confidentiality agreement or that a union or trust is otherwise prohibited by law from disclosure.
- Information in situations where disclosure would endanger the health and/or safety of an individual.
- A union must identify each schedule from which any itemized receipt or disbursement was excluded because of an asserted legitimate interest in confidentiality and describe the general types of information omitted.
- However, a member of a union has the statutory right to examine any books, records and accounts necessary to verify the financial report if the member can establish just cause for access to the information. The Department states that any exclusion of itemized receipts or disbursements would constitute per se demonstration of just cause for purposes of this Act. Consequently, any union member (and the Department), upon request, has the right to review the undisclosed information in the union’s possession at the time of the request that otherwise would have appeared in the applicable schedule if the information is withheld in order to protect confidentiality interests. The labor organization also must make a good faith effort to obtain additional information from the trust.
- Information that is withheld from full disclosure because of risk to an individual’s health or safety or where federal or state laws forbid the disclosure of the information is not subject to the per se disclosure rule (but may OLMS may nevertheless argue that it must be subject to review based on a showing of “just cause”.)

Therefore, it appears that HIPAA Protected Health Information would not be subject to the per se disclosure. However, since no federal law protects the confidentiality of pension information, the names, addresses and payment amounts of pensioners would not be protected and, therefore, must be disclosed. Canada does have privacy laws that limit disclosures of pension and other information. It is not clear if trusts will be required to disclose information on Canadian participants and whether Canadian law can be the basis to limit disclosure under this provision.

Here is what the Department has to say about confidential information:

Under the proposal, a labor organization that elects to file only aggregated information about a particular receipt or disbursement, whether to protect an individual's privacy or to avoid the disclosure of sensitive negotiating or organizing activities, must so indicate on the Form T-1. A labor organization member has the statutory right “to examine any books, records, and accounts necessary to verify” the labor organization's financial report if the member can establish “just cause” for access to the information. 29 U.S.C. 431(c); 29 CFR 403.8. Information reported only in aggregated form remains subject to a labor organization's member's just cause right. Such aggregation will constitute a per se demonstration of “just cause,” and thus the information must be available to a member for inspection. By invoking the option to withhold such information, the labor organization is required to undertake reasonable, good faith actions to obtain the requested information from the trust and facilitate its review by the requesting member. Payments that are aggregated because of risk to an individual's health or safety or where

federal or state laws forbid the disclosure of the information are not subject to the per se disclosure rule.

The Department specifically invites comments on this approach, including whether transactions involving a section 3(l) trust would pose a genuine risk to a labor organization's organizing or negotiating strategy. *The Department seeks comments on whether to narrow, clarify, or remove the confidentiality exception from the Form T-1 instructions [emphasis added].*

When Must the Report Be Filed?

Within 90 days after the end of the union's fiscal year (usually the calendar year), covering information for the trust's most recently completed fiscal year. Obviously, for some national plans where multiple unions or different locals from the same union participate, the fiscal years may vary considerably further complicating the funds' burden.

Who Must File?

Each labor organization that represents fund beneficiaries must file a T-1 for that fund, even if that results in multiple (perhaps hundreds) of filings of the same information for the same trust. Locals of the same International Union are treated as separate unions for this purpose. For example, each local union whose annual receipts are greater than \$250,000 (the current cutoff for filing the LM-2) must file and those who participate in a national or regional fund must file a T-1 for that fund including all of the transactions described above for the entire fund. Labor organizations with annual receipts of less than \$250,000 are exempted.

The form must be signed by the union's president and treasurer, under penalty of perjury. These officers must certify that they have examined the information submitted with the T-1 Form and certify that it is true, correct and complete to the best of the signer's knowledge and belief.

Unions must maintain records that will provide in sufficient detail, the information and data necessary to verify the accuracy and completeness of the report. But, the unions need not keep separate copies of records to verify the T-1 at their own locations so long as members have the same access to such records from the trust as they would be entitled to have from the unions.

Must the Trusts Provide the Information Requested?

“...the Department expects that trusts will routinely and voluntarily comply in providing such information to reporting labor organizations. Nevertheless, in those rare instances where a trust balks at providing the necessary information, the labor organization may request that the Department use its available investigatory authority to assist the reporting labor organization to obtain information necessary to complete the Form T-1.”

The LMRDA applies to employers and labor unions, but not to ERISA plans and other funds that they sponsor. Accordingly, OLMS cannot compel the plans to provide the information that the unions need to complete the forms. However, in the Preamble to the proposal the Department said:

In earlier rulemaking efforts, several commenters expressed concern that a section 3(l) trust could refuse to provide the information needed to complete the Form T-1. Several commenters expressed concern about a labor organization's liability for failure

to file a timely report, given that the trust might refuse to provide the information and the labor organization may be unable to compel production. The Department acknowledges that this may remain a possibility under this proposal. However, given that the reporting obligation under the proposal only arises where a labor organization, alone or in combination with other labor organizations, maintains management control or financial domination over a trust, the possibility of such intransigence appears remote. The Department's view is supported by the public comments received about the 2002 proposal. No comment suggested that any administrator of a section 3(l) trust had expressed an intention to withhold from a labor organization information required to complete the Form T-1. Further, although there were some statements that a trust would be bound by its own fiduciary obligations in determining whether to make the information available, there was no suggestion that any trust held the view that it would violate such duty by providing the information required by the form. **Thus, the Department expects that trusts will routinely and voluntarily comply in providing such information to reporting labor organizations. Nevertheless, in those rare instances where a trust balks at providing the necessary information, the labor organization may request that the Department use its available investigatory authority to assist the reporting labor organization to obtain information necessary to complete the Form T-1 [emphasis added].**

The Department expects that labor organizations and labor organization officials will take timely, reasonable, and good faith actions to obtain the necessary information from section 3(l) trusts and, where they have done so, the Department will not assert a willful and knowing violation of the filing requirement against the labor organization, its president, or secretary-treasurer.

It should be noted, however, that due to the exemption for plans which file the Form 5500 contained in the earlier version, Funds most likely to have raised the types of objections the department observes would have had no reason to comment as the rule did not apply to them.

Conclusion:

This proposal is of obvious concern to funds for two principal reasons. First, from the perspective of multiemployer benefit funds, the proposal is entirely based on the premise that unions dominate a fund if employer contributions made on behalf of union members are more than 50% of the trust's annual "revenues", or if the union or unions which participate appoints a majority of the trust's governing board. For this purpose, contributions made on behalf of the unions and employer contributions made on behalf of union members are treated as made by the unions. This is characterized in the proposal as the union's financial domination and control of the trust. **This presumption is contrary to established labor and benefits law and the actual functioning of funds and is without factual support other than the assertion by OLMS that this is the case.**

Second, this proposal places an enormous burden on funds and presents a serious legal issue whether funds may properly provide the information required to complete the T-1. It is clear that funds cannot pay the costs of developing this information. However, merely obtaining reimbursement from the unions required to report does not fully resolve the problem. Given the \$250,000 threshold for reporting unions, it is impossible for funds to know how many groups such costs will be distributed over without extensive research. More importantly, the assets of an ERISA covered plan must be held "for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." ERISA §403(c)(1). Notwithstanding the OLMS' "offer" to "use its available investigatory authority to assist the reporting labor organization to obtain information necessary to complete the Form T-1," plan fiduciaries are limited in what they may do to meet such a request.

ERISA's fiduciary standards clearly mirror the standards of the law governing the establishment of a trust (referenced above) stating "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries; and (A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying the reasonable expenses of administering the plan;..." ERISA §404(a)(1). Therefore, if the effort required to develop and provide the information required for T-1 within the required time frame will interfere with the proper administration of plan benefits, it would seem that ERISA would prohibit plan fiduciaries from engaging in this effort. Of course, each fund's board will have to make the determination whether the T-1 efforts can be managed without affecting the fund's benefits and services and should consult counsel for an opinion as to the legality of complying with this request.

The burden of disclosure will vary from fund to fund. For some funds there may be relatively few reportable receipts or disbursements. In the case of other funds, there may be literally thousands of schedules reporting, for example, payments to pensioners, payments to medical service providers and contribution receipts from contributing employers. Furthermore, the determination of financial dominance may vary from year to year, especially with respect to mature pension funds whose receipts from investments may provide more than 50% of plan revenues.

The Department's analysis of the burden imposed by T-1 seems inadequate and the burden itself underestimated. (See pages 11768 through 11777 of the attached proposal.). Our discussions with some funds indicate that preparing the requested information in the specific format of the required disclosures may require substantial effort within a very short time frame that cannot be met by temporary employees and may require shifting resources away from the proper functions of these plans.

In the burden analysis, part of the Preamble, (which is required by Executive Order) the Department makes little mention of the burden on the trusts and provides no analysis of the burden on trusts separate from the burden on unions despite the acknowledgement earlier in the proposal that "because the section 3(1) trust, not the reporting labor organization, will undertake the bulk of the recordkeeping burden, the size of the reporting labor organization may be less significant than it is in the Form LM-2 context." (See p. 11762.)

Part of the burden analysis is the importance of the information to be reported. A recurring theme of the Department in support of the analysis is that T-1 reporting is needed (and the reporting burden justified) because "Labor organization members have no information on their labor organization's 3(1) trusts." (See pp11770-11771.) In the case, of most ERISA covered funds, this is simply not true and it ignores the reporting requirements imposed upon funds by ERISA as enacted and amended repeatedly since 1974 to expand such reporting requirements, and the significantly expanded reporting requirements of the recently enacted Pension Protection Act of 2006.

What you can do.

First, review the attached Notice of Proposed Rulemaking and analyze the impact on your fund. NCCMP will be preparing comments on this proposal and information concerning your evaluation of the impact on your fund's operation is very important. Your analysis should involve fund counsel as well as your administrator, auditors, internal bookkeepers and systems specialists who should attempt to identify any changes that might be needed in plan processes. It should include estimates of the possible costs and disruptions to normal plan operations, in order to obtain and organize plan data that is neither readily available, nor necessary for the administration of the fund for the exclusive benefit of its participants, in a manner that would be responsive to unions' need to report on them. Your input is valuable whether you determine the impact of this proposal on your plan to be great or small. We need to develop an accurate assessment of the impact for our comments.

Second, help the NCCMP prepare its comments by completing the on-line survey which can be found at http://www.surveymonkey.com/s.aspx?sm=fLn8e2gdPYiRUtpWIF7h6w_3d_3d . The survey is currently under construction, but will be available beginning Monday, April 14. The deadline for completing the survey is Friday, April 25 so the results can be tabulated, analyzed and incorporated into the NCCMP's comments prior to the filing deadline of Monday, May 5.

Finally, consider having your fund submit comments on this proposal directly to OLMS. It is vitally important to submit information concerning the burden this will impose on plans and the impact it may have on the plan's administration and benefit functions. We believe that it is also important to counter the erroneous presumption that unions dominate funds and that the portion of a fund's revenues based on employer contributions made pursuant to a collective bargaining agreement is indicative of anything more than the fact that the employees have exercised their rights under the law to bargain collectively. If you choose to comment, please note that in response to requests filed by several national multiemployer pension funds, the period for comment has been extended from April 18, 2008 to May 5, 2008.



The information contained in this and every issue of Multi-Elert is believed to be correct to the extent information is available. Nevertheless, the NCCMP does not offer legal advice. Plan fiduciaries should rely on their own attorneys and other professional advisors for advice on the meaning and application of any Federal laws or regulations to their plans.

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If you have questions about the NCCMP, or about this or other issues of Multi-Elert, please contact Randy G. DeFrehn, Executive Director, NCCMP, by phone at (202) 737-5315 or by e-mail at rdefrehn@nccmp.org.

