electrical training
IBEW - NECA ALLIANCE

TODD STAFFORD, EXECUTIVE DIRECTOR

NECA

July 26, 2021

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

Submitted online through www.regulations.gov

Re: RIN 1245-AA12

Dear Mr. Davis,

I am writing on behalf of the *electrical training ALLIANCE (*"ETA") regarding the proposed rescission of Form T-1 by the Office of Labor-Management Standards ("OLMS"), Department of Labor ("Department" or "DOL"), proposed on May 27, 2021 (the "Proposal"). *Rescission of Labor Organization Annual Financial Report for Trusts in Which a Labor Organization is Interested, Form T-1*, 86 Fed. Reg. 28505 (May 27, 2021).

The *electrical training ALLIANCE* is a nonprofit organization founded in 1941 by the National Electrical Contractors Association (NECA) and the International Brotherhood of Electrical Workers (IBEW). The organization is committed to developing and standardizing education in the electrical industry allowing apprenticeship and training funds to properly and effectively train members of NECA and the IBEW. Since its inception, more than 325,000 apprentices have completed ETA training curriculum and become competent Journeymen.

For the reasons set forth in more detail below, we strongly support OLMS's Proposal to rescind the Form T-1. We agree with OLMS that the current version of the Form T-1 reporting regulation sweeps too broadly, covering employer-funded and other entities that should not be subject to the requirement to file a Form T-1. For a variety of reasons, we also agree that the Form T-1 reporting requirement presents such an unreasonably high burden for the trusts subject to reporting that the rule is effectively unworkable. We agree with the current administration of OLMS that the reporting requirement in its current form should be rescinded and eliminated from the Code of Federal Regulations.

I. The Form T-1 Reporting Requirement Sweeps too Broadly

A. The Test to Determine a Labor Organization's Financial Dominance of an Entity Should Not Include Contributions by Employers

Under OLMS's most recent final Form T-1 regulation finalized in 2020 (the "Regulation"), the Form T-1 reporting requirement applies to any "trust in which a labor organization is interested" within the meaning of 3(l) of the Labor Management Reporting and Disclosure Act ("LMRDA") if one of the following two conditions is met–

> The labor organization, alone or with other labor organizations,
>
> (1) appoints or selects a majority of the members of the trust's governing board, or
> (2) contributes more than 50 percent of the trust's receipts during the trust's fiscal year.

29 C.F.R. § 403.2(d)(1)(i) (an "Interested Trust"). The Regulation further provides that "any contributions by an employer pursuant to a collective bargaining agreement with a labor organization shall be considered contributions by the labor organization." 29 C.F.R. § 403(d)(1)(iii). The term "Labor Organization" is defined in the LMRDA, 29 U.S.C. § 402(i).

We strongly disagree with the continued assertion by OLMS that contributions made by an employer under a collective bargaining agreement ("CBA") should be treated as contributions by a Labor Organization when measuring the Labor Organization's "financial dominance." We couldn't agree more with current OLMS leadership that the above reporting test, as formulated by a previous administration, oversteps a critical limitation on the Department's authority to require reporting under Title II of the LMRDA. In this regard, section 208 of the LMRDA provides the following –

> "The Secretary shall have authority to issue, amend, and rescind rules and regulations prescribing the form and publication of reports required to be filed under this title and such other reasonable rules and regulations (including rules prescribing reports concerning trusts in which a labor organization is interested) as he may find necessary to prevent the circumvention or evasion of such reporting requirements."

29 U.S.C. § 438. Thus, as a threshold matter, the Secretary of Labor *must* first determine that reporting is required "to prevent the circumvention or evasion" of a Labor Organization's own reporting obligations under the LMRDA in order to then require a section 3(l) trust in which a labor organization is interested to file a report. *AFL-CIO v. Chao*, 409 F.3d 377, 386-387 (D.C. Cir. 2005) (discussing the two-part test of section 208 of the LMRDA). Indeed, the reporting requirements set forth under Title II of the

LMRDA apply to Labor Organizations,[1] and set forth reporting obligations that shine light on the Labor Organization's financial condition, transactions and operations, not the financial condition, transactions and operations of a separate legal entity. 29 U.S.C. § 431(b) ("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… ." (emphasis added.)).

ETA strongly believes that Employer contributions should not be considered Labor Organization contributions for purposes of the 50% rule. Employer contributions are simply not labor organization funds, and employer-funded trusts are likewise simply not labor organization funds subject to reporting under Title II of the LMRDA. Thus, an employer-funded trust should not be swept within a reporting requirement that is needed to prevent the evasion reporting under Title II of the LMRDA.

The basis for OLMS's analysis in this regard appears to be its over-reaching generalization that because an employer's contributions to an Interested Trust might otherwise be paid to a Labor Organization's members in the form of higher wages, these employer contributions should be treated as Labor Organization contributions for purposes of measuring the Labor Organization's financial dominance. *See* 67 Fed. Reg.79280, 79283 (Dec. 27, 2002).

The assertion that employer contributions to an Interested Trust would necessarily be paid to Labor Organization members as wages if not paid to the Interested Trust depends on fallacious reasoning. Simply put, employer contributions to benefit funds are never Labor Organization money. Employer contribution rates are set through the federally regulated and sometimes contentious collective bargaining process. Employers need not, and often do not, agree with the Labor Organization about wages or contributions to Interested Trusts and employers are not required to yield to a union's demands in collective bargaining. Employer contributions are part of the total economic package that an employer agrees to through collective bargaining and they come out of an employer's total assets. Employers will often choose to use any savings obtained at the bargaining table for other business purposes rather than pay higher wages to Labor Organization members any time it lowers its contribution obligations to an Interested Trust. Moreover, even if an employer utilized savings at the bargaining table to increase wages, those elevated wages paid to union members would not be subject to reporting under Title II of the LMRDA. We believe there is no practical or technical basis for characterizing employer contributions as Labor Organization contributions when determining whether a Labor Organization financially dominates an Interested Trust.

Moreover, we remind the Department that it is clear under ERISA that once an employer contributes its money to an ERISA-covered plan (an "ERISA Plan"), that money becomes "assets of the plan" ("Plan Assets"). *See* DOL ERISA Advisory Opinion

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[1] Title II reporting is also required of Labor Organization officers and employees as well as employers, for a limited range of payments made or received by them. 29 U.S.C. §§ 432, 433.

93-14; Preamble to Prohibited Transaction Exemption 76-1, 41 Fed. Reg. 12740 at 12741 (Mar. 26, 1976). ERISA-covered Plan Assets are subject to ERISA's trust requirement as well as all of the other fiduciary requirements of ERISA, including the requirement that Plan Assets must be used solely for the payment of benefits or for defraying plan administrative expenses. *See, e.g.*, ERISA §§ 404(a)(1)(A), 403(a), 403(c)(1). ERISA covered Plan assets may never be used for the benefit of an employer or a sponsoring Labor Organization. *See* ERISA §§ 403(c)(1), 406(a)(1)(D), 3(14)(D). Thus, as a matter of both fact and law, it is incorrect to treat employer contributions to ERISA Plans as Labor Organization contributions to ERISA Plans by which a Labor Organization can dominate or control an Interested Trust. ERISA-covered Plan Assets enjoy a separate legal status from Labor Organization Funds under ERISA. ERISA § 502(d)(1).

Significantly, several courts have considered whether an ERISA Plan may be considered to hold "Labor Organization funds" for purposes of the LMRDA and have rejected this view, holding that they are "Plan Assets" and cannot be treated as Labor Organization funds for purposes of the LMRDA. *See, e.g.*, *Hearn v. McKay*, 603 F.3d 897, 901-903 (11th Cir. 2010) (Once contributions enter an ERISA Plan they become "part of an irrevocable trust and assets of the plan," and "neither the union nor its members as a group own the allegedly misused funds."); *Noble v. Sombrotto*, 84 F.Supp.3d 11, 24 (D.D.C. 2015) (A claim for fiduciary breach under section 501(a) of the LMRDA may not be made in connection with allegations of misuse of funds in benefit plans because those funds are not Labor Organization funds.); *c.f., Local 144 Nursing Home Pension Fund v. Demisay*, 112 S. Ct. 2990 (1992). The Regulation's treatment of employer contributions as equivalent to union control blatantly ignores the role of employers as separate market actors completely independent of Labor Organizations. It also turns a blind eye to the Taft-Hartley Act's equal representation requirement's prophylactic purpose of requiring employers to counter the influence of Labor Organizations on Taft-Hartley trusts. Consequently, ETA fervently objects to the treatment of employer contributions as contributions by a Labor Organization, and for this reason strongly supports OLMS's Proposal to rescind the Form T-1 reporting requirement.

B. <u>Organizations that File a Form 990 should be Exempt from T-1 Reporting</u>

We also agree with OLMS that the Regulation is overbroad because it contains no exemption for trusts that file an annual Form 990 with the Internal Revenue Service ("IRS"). In this regard, even if a trust is otherwise dominated by a Labor Organization and properly subject to reporting under section 208 of the LMRDA, trusts that file a Form 990 should be exempt from Form T-1 reporting.

The Form 990 is filed every year with the IRS by most organizations that qualify for an exemption from taxation under section 501(c) of the Internal Revenue Code (the "Code"), including 501(c)(3) nonprofit charitable organizations. Many trusts and other organizations that are associated with Labor Organizations file the Form 990, including voluntary employees' beneficiary association or "VEBA" trusts, apprenticeship and training funds, labor management cooperation committees, charitable disaster relief funds, and other trusts associated with Labor Organizations. The Form 990 reports detailed information to the IRS about the nonprofit organization, its financial status and transactions, and its administration.

Significantly, the Form 990 requests much of the same, and sometimes even more, information than the Form T-1 requests. Thus, the Form T-1 is largely unnecessary to prevent the circumvention or evasion of the Form LM-2 reporting requirements because that information should already largely be reported on an Interested Trust's Form 990, especially with regard to entities that are tax-exempt under sections 501(c)(3) and 501(c)(4) of the Code. Moreover, under section 607 of the LMRDA, OLMS should be mindful of other financial reports required by other federal agencies before subjecting Interested Trusts to additional expensive and detailed financial reporting requirements that impose significant burdens on Labor Organizations.

The Form 990 is designed to require reporting of information that determines compliance with provisions of the Internal Revenue Code ("Code") regarding organizations exempt from tax under section 501(c) of the Code. Those rules prohibit a 501(c) tax exempt entity from providing more than an incidental private benefit to another individual or entity. The information required is comprehensive, especially in concert with the tax requirements under the Code.

In particular, the Form 990 requires the reporting of all of the basic financial information regarding assets and liabilities set forth in the Form T-1. In many cases, a list of contributors of amounts over $5,000 will be required on the Form 990's Schedule B. In addition, the Form 990 requires the identification of "Related Organizations" that would often include the sponsoring Labor Organization. And, too, all of the trustees, directors, key officers, and highly compensated employees of the entity are required to be identified per the Form 990 instructions for Part VII.A. Moreover, compensation of more than $10,000 from Related Organizations to those individuals must also be listed. Additional information on the Form 990, Schedule J even includes questions as specific as to whether those individuals were provided first class or charter travel. Part VII. B of the Form 990 also requires the identification of the top five independent contractors receiving $100,000 or more and their compensation. Significantly, with respect to concerns that a Labor Organization will be making contributions to a tax exempt Interested Trust, Part VII 1.d requires that revenue from Related Organizations (like a sponsoring Labor Organization) be reported, and Part X. Line 22 requires a reporting of loans to trustees of an interested entity. Importantly, the Schedule R requires that transactions with Related Organizations, including gifts, grants, loans, loan guarantees, dividends, sales of assets to, exchanges of assets, lease of facilities or other assets, performance of services, reimbursement of expenses, and transfer of cash or property be reported in Part V of that Schedule. Thus, the information required to be reported for any of the 501(c) tax exempt entities already generally require the substantive information to be contained in the proposed Form T-1.

Form 990 Schedule L requires a great deal of information similar to the proposed Form T-1 regarding those Excess Benefit Transactions. For example, Part III of Schedule L of the Form 990 requires that "Grants or Assistance Benefiting Interested

Persons" all need to be reported, including the name of the interested person, the relationship to the 501(c)(3), the amount of the assistance, the type of assistance, and the purpose of assistance. Similarly, and, again in duplication of the Form T-1, "Business Transactions Involving Interested Persons" need to be reported on Part IV of the Form 990 Schedule L. That information includes the name of the Interested person, the relationship, the amount of the transaction, the description of the transaction, and whether there was sharing of the organization's revenues. As you can see, at least in the case of an entity tax exempt under sections 501(c)(3) or (c)(4), the Form T-1 is redundant and is not necessary to prevent the circumvention or evasion of the reporting requirements of Title II of the LMRDA, as required by LMRDA section 208.

C. <u>All ERISA-Covered Plans Should be Exempt from Form T-1 Reporting</u>

The Regulation is further overbroad because it does not contain a broad exemption from Form T-1 reporting for all ERISA-covered plans. The ETA strongly believes that this exception should cover *all* ERISA-covered plans, regardless of whether they are required to file a Form 5500 under ERISA.

Under ERISA, the Secretary of Labor is authorized to issue regulatory exemptions from ERISA's Form 5500 filing requirements, or simplified Form 5500 reporting methods, for ERISA-covered plans. ERISA §§ 103(a)(3)(A); 104(b)(2); 110. Pursuant to this authority, the DOL has issued an extensive patchwork of Form 5500 reporting regulations that exempt or greatly simplify Form 5500 reporting for a wide variety of ERISA-covered plans and entities. Apprenticeship and training funds sponsored in part by a Labor Organization would generally be subject to ERISA as an employee welfare benefit plan, but typically would not file a Form 5500. Instead, these training funds file a one-time, one-page statement with EBSA in order to satisfy their ERISA annual reporting requirement under a DOL regulation. 29 C.F.R. § 2520.104-22. Under the Regulation, these apprenticeship and training funds would be subject to filing a Form T-1 even though they are ERISA-covered plans because they do not file a Form 5500.

Nonetheless, as we stated above, under ERISA once an employer contributes its funds to an ERISA-covered plan or trust (an "ERISA Plan"), that money becomes "assets of the plan" ("Plan Assets"). *See* DOL ERISA Advisory Opinion 93-14. And all ERISA-covered Plan Assets, including assets held in the plan's trust, are subject to ERISA's fiduciary requirements which require Plan Assets to be used exclusively for the payment of benefits or for defraying plan administrative expenses. *See, e.g*., ERISA §§ 404(a)(1)(A), 403(a), 403(c)(1). Thus, all assets held by an ERISA covered plan must not be treated as Labor Organization contributions through which a Labor Organization can dominate or control the ERISA-covered plan. Several courts have considered whether an ERISA Plan may be considered to hold "Labor Organization funds" for purposes of the LMRDA and have rejected this view, holding that they are "Plan Assets" and cannot be treated as Labor Organization funds under the LMRDA. *See Hearn*, 603 F.3d at 901-903. Because all ERISA covered Plan Assets cannot qualify as Labor Organization funds as a matter of law, requiring any ERISA covered plan (even those that do not file a Form 5500) to file a Form T-1 is absolutely not needed to prevent the evasion of a Labor Organization's own reporting obligations under the LMRDA, and violates section 208 of the LMRDA.

Moreover, all ERISA-covered plans and funds, including apprenticeship and training funds, are subject to extensive financial and operational regulation under ERISA. As the Supreme Court has stated, ERISA Plans are subject to a "comprehensive and reticulated" regulatory scheme. *Central States Pension Fund v. Central Transport*, *Inc*., 472 U.S. 559 (1985). This extensive federal regulation provides a second basis for concluding that all ERISA-covered plans should be exempt from Form T-1 reporting. ERISA imposes, among other requirements, detailed annual reporting requirements, requirements to provide information to plan participants, and high fiduciary standards that apply to plan officials involved in the management and operation of the benefit plans. ERISA's fiduciary rules require plan officials to act solely in the interest of participants and beneficiaries. ERISA § 404(a)(1). Plan fiduciaries are required to use the plan's assets exclusively for the purpose of either providing plan benefits or defraying the administrative expenses of the plan. ERISA § 404(a)(1)(A). The prohibited transaction restrictions of section 406(a) of ERISA severely restrict the plan from engaging in transactions with "parties in interest," including the sponsoring employer, any contributing labor organization, and members of the plan's governing body. ERISA § 406(a). Moreover, the restrictions of section 406(b) preclude a plan fiduciary from dealing with the plan's assets in his own interest, from acting adverse to the plan in a plan transaction, or from receiving a payment from a third party in a plan transaction. ERISA's fiduciary duties have been described as "the highest known to the law." *Donovan v. Bierwirth*, 680 F.2d 263, 272 n. 8 (2d Cir. 1982).

ERISA also includes enforcement provisions that impose personal liability on fiduciaries who are found to have breached a fiduciary duty. ERISA § 409. Significantly, ERISA also imposes criminal penalties in the case of willful violations of its reporting and disclosure obligations. ERISA § 501. Thus, ERISA and a myriad of other federal laws that apply to ERISA-covered plans, including COBRA, HIPPA, FMLA and others, impose detailed administrative and management requirements on ERISA-covered plans. As OLMS is aware, ERISA-covered plans are subject to extensive regulation under these and other federal laws.

Section 607 of the LMRDA encourages the Secretary to "avoid unnecessary expense and duplication of functions among Government agencies…by making arrangements for cooperation or mutual assistance in the performance of functions under this Act." Because ERISA gives the Employee Benefits Security Administration ("EBSA") jurisdiction over ERISA-covered employee benefit plans, OLMS should not impose additional reporting requirements on ERISA-covered plans beyond the reporting and disclosures already required under ERISA. In light of the extensive regulation applicable to ERISA plans and ERISA's prohibition against using Plan Assets to benefit a Labor Organization, all ERISA-covered plans should be exempt from Form T-1 reporting regardless of whether they may be exempt from filing the Form 5500 under ERISA or implementing regulations.

II. The Form T-1 Reporting Requirement is Excessively Burdensome and Ignores the Difficulty Labor Organizations will have Obtaining Necessary Information

We believe that the Regulation imposes substantial burdens on filers that were not sufficiently considered or addressed by OLMS in its most recent rulemaking. Described as follows, there are a number of practical issues that make completing the Form T-1 excessively difficult if not impossible for Labor Organizations, particularly in light of the fact that many trusts swept within the T-1 reporting requirement are not "dominated" by union money because they are employer-funded, or they are subject to ERISA or other federal public filing requirements (such as the Form 5500 or Form 990). Because the Form T-1 reports information that will not assist in detecting fraud or abuse in the use of Labor Organization money, we believe its associated burdens overshadow any possible regulatory or oversight benefit. For these reasons, we support OLMS's Proposal to rescind the Form T-1 filing requirement in its current form.

A. Interested Trust Information Is Confidential and Proprietary

The Regulation ignores the substantial burdens placed on Form T-1 filers in order to collect and compile the data necessary to complete and file the form and, as a result, is unworkable. As finalized, the Form T-1 filing obligation falls on the Labor Organization and not the Interested Trust. Nonetheless, as a practical matter, in almost all cases, the Labor Organization will be dependent upon a separate legal entity, the Interested Trust, to provide the level of detailed, itemized financial data necessary to file the Form T-1. OLMS received comments regarding a Labor Organization's inability to obtain information from the Interested Trust and its potential liability where an Interested Trust refuses to provide Form T-1 information. In response to these comments, OLMS stated in the preamble to the 2019 proposed rule: "[t]he 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." 84 Fed. Reg. 25130 at 25140 (May 30, 2019). This statement is important for two reasons. First, it underscores the fundamental impropriety of treating employer contributions as evidence of Labor Organization domination. The fact that an Interested Trust may decide not to give the information required by the Form T-1 to the Labor Organization at its discretion (which the Labor Organization does not control) or because the Interested Trust cannot release such information because it is prohibited from doing so as a matter of contract or law demonstrates that the Interested Trust is not in fact "controlled" or "dominated" by the Labor Organization. Since such a trust is not dominated by the Labor Organization, requiring such a trust to file a Form T-1 is not necessary in order to prevent the evasion of a reporting requirement of the Labor Organization within the meaning of section 208 of the LMRDA. The statement is also significant because it offers no practical solution to a very real stumbling block that many Labor Organizations will confront in attempting to obtain necessary information from the Interested Trust.

We believe that the Regulation greatly underestimates the inability of a Labor

Organization to obtain necessary information from an Interested Trust for purposes of Form T-1 reporting. Detailed information regarding the entity is confidential information that belongs exclusively to the Interested Trust. Many organizational documents provide that the Interested Trust's information is confidential. To the extent not already disclosed on a Form 990, we believe that officials governing an Interested Trust will have a legal obligation to protect the entity's information from disclosure to the Labor Organization or the public and will not be able to respond to the Labor Organization's requests for the data. Asking a Labor Organization to attempt to secure Form T-1 information from a separate legal entity where the trust refuses or asserts a confidentiality defense is asking the Labor Organization to assume too high.

B. <u>ERISA Fiduciary Breach Concerns</u>

The Regulation also fails to address the concerns of many commenters who pointed out that, in the case of an ERISA Plan, the trust's provision of information to the Labor Organization for purposes of completing the Form T-1 raises ERISA fiduciary duty and prohibited transaction issues. In this regard, ERISA requires that Plan Assets be used only for the provision of plan benefits or for defraying the reasonable expenses of administering a plan. ERISA §§ 403(c)(2); 404(a)(1)(A). Moreover, ERISA prohibits a plan fiduciary from using plan assets for the benefit of a party in interest, a term that includes a contributing Labor Organization. ERISA §§ 406(a)(1)(D); 3(14)(D). OLMS addressed this issue in the Final 2008 Form T-1 preamble by stating that "EBSA has reviewed this rule and specifically advises that it would not consider a plan fiduciary to have violated ERISA's fiduciary duty or prohibited transaction provisions by providing officials of a sponsoring Labor Organization with [Form T-1 information], provided the plan is reimbursed for any material costs incurred in collecting and providing the information to the labor organization officials." 73 Fed. Reg. 57412, 57432 (Oct. 2, 2008). OLMS went on to state that EBSA explained that a "contrary interpretation [of ERISA] is disfavored because it would impede compliance with the LMRDA… . The Department expects that trusts will routinely and voluntarily comply in providing such information to reporting labor organizations." *Id*. In the preamble to the final Regulation, OLMS simply restated this language and assured that those statements reflected current EBSA thinking. *Labor Organization Annual Financial Reports for Trusts in which a Labor Organization is Interested*, Form T-1, 85 Fed. Reg. 13414, 13425 (Mar. 6, 2020).

As explained above, many ERISA-covered trusts, including apprenticeship and training funds, would be subject to Form T-1 reporting because they are exempt from filing a Form 5500 under DOL regulations. ETA finds this preamble language to be an unsatisfying and cursory response to a significant legal issue under ERISA. Because ERISA fiduciaries may be held personally liable for losses to the plan resulting from their breaches of fiduciary duty and prohibited transactions (which would include spending ERISA-covered Plan assets to compile information to benefit a Labor Organization), many Interested Trusts covered by ERISA will not be comfortable relying on this preamble language without a formal opinion EBSA. This further contributes to the unworkability of the Regulation.

Ironically, the Regulation inherently causes a conflict of interest for trustees of Interested Trusts. When an Interested Trust covered by ERISA enters into an agreement with a Labor Organization to receive reimbursement for costs incurred in providing Form T-1 data to a Labor Organization, which OLMS itself suggested was necessary to avoid ERSA concerns, Labor Organization trustees will have to recuse themselves in order to avoid violating ERISA's self-dealing restrictions in agreeing to the amount and terms of the reimbursement. *See* DOL Adv. Op. 1999-09A (May 21, 1999). The fact that the Labor Organization appointed trustees cannot even vote on whether the Interested Trust's information should be shared with the Labor Organizations clearly shows that the Labor Organization does not dominate the Interested Trust. ETA believes that OLMS has failed to consider the ramifications of these conflict of interest and fiduciary issues which, regardless of the legal analysis, will create potentially insurmountable problems for Labor Organizations trying to obtain the information necessary to file a Form T-1.

C. <u>Labor Organizations Will Be Unable to Determine whether a Given Trust Must File a Form T-1 where Multiple Labor Organizations are Involved</u>

We believe that the Regulation is further unworkable because it disregards the inability of some Labor Organizations to make the necessary determination that a trust is under the "control" of one or more Labor Organizations or is "dominated" by Labor Organization funds. Under the Regulation, Form T-1 reporting is required for a trust that is –

(1) 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 a primary purpose to provide benefits to members of the Labor Organization or their beneficiaries, AND

(3) The Labor Organization, either alone or in combination with other Labor Organizations, either (a) selects or appoints a majority of the members of the trust's governing board, OR (b) contributes more than 50 percent of the trust's receipts during the one-year reporting period.

As we explained above, the Labor Organization, in almost every case, will be dependent upon the Interested Trust to provide it with Form T-1 reporting information. Importantly, in many cases, a Labor Organization that may technically have an obligation to file a Form T-1 may not have sufficient information to *even make a determination that the trust is subject to T-1 reporting*. This is because the Regulation's test triggers reporting if a Labor Organization "alone or in combination with other labor organizations" selects a majority of trustees or contributes at least 50% of the trust's receipts.

Where multiple Labor Organizations contribute to a trust that are not affiliated (and may appoint trustees), each Labor Organization will not know that all of the contributing Labor Organizations <u>*together*</u> select a sufficient number of trustees or <u>*together*</u> contribute sufficient contributions to trigger T-1 reporting. Labor Organizations will certainly know what trusts they contribute to, but they often do not know every other Labor Organization that may contribute to an Interested Trust and they will commonly not know the extent of another Labor Organization's involvement or contribution to the entity. Moreover, a Labor Organization will in many cases not know if "a primary purpose" of the trust is to provide benefits to Labor Organization members because it will not know the extent of *non-Labor Organization* members benefited by the trust, or the extent of *other* Labor Organization members benefitted by the trust. Thus, the formulation of the reporting test that focuses on a "labor organization, alone or in combination with other labor organizations" meeting managerial and financial dominance tests will render many Labor Organizations completely unable to determine whether T-1 reporting is required for trusts to which they contribute together with other Labor Organizations.

D. Consideration of Multiple Labor Organizations in Measuring Labor Organization Dominance Exceeds the Scope of Section 3(l)

We note that the "alone or in combination with other labor organizations" language that appears in the Regulation's test for T-1 reporting does not appear in section 3(l) of the LMRDA and is inconsistent with section 3(l). Section 3(l) provides,

> "Trust in which a labor organization is interested" means 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.

29 U.S.C. § 402(l) (emphasis added). Thus, section 3(l) looks for trusts that are created or established *by a single Labor Organization* (or *a single Labor Organization* has appointed one or more members of the trust's governing body), and a primary purpose of the trust is to provide benefits for the members of *a single Labor Organization.* Section 3(l) itself does not envision aggregating multiple Labor Organizations together to evaluate whether the trust is a trust in which *multiple Labor Organizations* are interested.

We believe that OLMS exceeded its statutory authority in requiring Form T-1 reporting for trusts that may be "controlled" or "financially dominated" by multiple Labor Organizations when aggregated together but are not so controlled or financially dominated by *any single Labor Organization* on its own. We believe that a test for Form T-1 reporting that would align with section 3(l) would look for management control or financial dominance *by a single Labor Organization*, not for management control or financial dominance by multiple aggregated Labor Organizations that may be unaffiliated, unaware of each other, or potentially adverse. Regardless of OLMS's legal authority to adopt this portion of the reporting test, this issue exacerbates the practical problems associated with applying the test where multiple Labor Organizations contribute to a trust.

E. <u>The Regulation does not Appropriately Address who owns the T-1 Reporting Obligation where Multiple Labor Organizations Contribute</u>

Still another obstacle to satisfying a Labor Organization's Form T-1 filing obligation arises where multiple Labor Organizations, when aggregated together, either appoint a majority of trustees or contribute a majority of the trust's annual receipts. This is the issue of which Labor Organization among several is obligated to file the Form T-1. The Regulation itself addresses this issue only under circumstances where a parent Labor Organization contributes to a trust together with its affiliate Labor Organizations. On this point, the Regulation provides that only the parent Labor Organization is required to file the T-1 on behalf of itself and its affiliate Labor Organizations. 29 C.F.R. § 403.2(d)(2). Nonetheless, the Regulation does not address who owns the filing obligation where multiple unaffiliated Labor Organizations contribute to an Interested Trust. In such a case, the Regulation would require each Labor Organization to file duplicative Form T-1s for the same trust where those multiple Labor Organizations together meet the Regulation's managerial and financial dominance tests. 85 Fed. Reg. 13414 at 13423 ("The Department reiterates, however, that in the event the unions cannot agree on who should assume sole responsibility, each involved labor organization will be obligated to file a Form T-1 for the reporting period."). When asked which Labor Organization should be required to file the Form T-1 in this case, OLMS responded to commenters that "it will allow a single union to file both on its behalf and on the behalf of the other unions involved" on a voluntary basis. *Id*.

This response is unsatisfactory and does not align with reality. First, it simply cannot be that multiple unions are required to file duplicative T-1s for a single Interested Trust in light of the substantial resources needed to complete the task. Indeed, we believe that section 208 mandates that only one Form T-1 be filed for any single Interested Trust because multiple duplicate filings could not be necessary to prevent the evasion of a Labor Organization's filing obligations under Title II of the LMRDA. And as we described above, where multiple unaffiliated Labor Organizations contribute to a trust, we believe any one Labor Organization will not have the information necessary to determine if the trust meets the Form T-1 reporting test. Even if a Labor Organization may be aware that its contributions together with those of other Labor Organizations exceed the misguided financial dominance test, no Labor Organization will "volunteer" to expend the substantial financial and human resources needed to complete the Form. Indeed, ETA is concerned that one Labor Organization's "volunteering" to satisfy another Labor Organization's filing obligation could give rise to concerns about fiduciary duties owed by the Labor Organization's officers under section 501(a) of the LMRDA. In short, without a bright line test that identifies which Labor Organization among many has the filing obligation, the Form T-1 filing requirement asks too much and is unworkable.

F. <u>OLMS has Underestimated the Hours Needed to Complete the Form T-1</u>

Finally, ETA disputes OLMS's estimates of the hours needed to complete the Form T-1. OLMS estimated that the Form T-1 would take approximately 121 hours to complete in the first year, and 84 hours in subsequent years. 86 Fed. Reg. at 28510. We think a more accurate assessment would more than double these estimates. We believe that OLMS has failed to consider that in order to complete the form, personnel from both the Labor Organization and the Interested Trust must perform significant work. In light of the substantial difficulties that Labor Organizations will face in trying to obtain information from Interested Trusts, the uncertainty of who has the filing obligation where multiple Labor Organizations are involved, and the potential that multiple Labor Organizations will file duplicative Form T-1s for the same Interested Trust where no single Labor Organization "volunteers" to take on the task, we believe OLMS's estimates fall substantially short of the real man-hours burden these filings represent. Consequently, the cost of the Regulation greatly outweighs the illusory, redundant, and unnecessary information the Form T-1 requires, and we urge the Department to rescind the Regulation.

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The ETA appreciates the opportunity to provide these comments to OLMS. We welcome the opportunity to further explain or answer any questions about our comments.

Sincerely,

Todd Stafford
Executive Director

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