July 29, 2019

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

Re: RIN 1245-AA09

We are writing on behalf of the National Electrical Contractors Association ("NECA") to provide comments on the rule proposed by the Office of Labor-Management Standards ("OLMS") that would require a labor organization to file an annual financial report, the Form T-1, on certain trusts in which the labor organization has an interest (the "Proposed Rule"). 84 Fed. Reg. 25130 (May 30, 2019).

NECA is a construction trade association composed of more than 4000 electrical contractor members served by 118 Chapters in the United States chartered by and affiliated with NECA. The primary purpose of the NECA Chapters is to act as multi-employer bargaining agent for their members and contractors who authorize them to act as their collective bargaining agent with the local unions of the International Brotherhood of Electrical Workers ("IBEW"). NECA-represented electrical contractors contribute to many trusts established in accordance with the Taft-Hartley Act of 1947, as amended (the "Taft-Hartley Act" and "Taft-Hartley Trusts"). These Taft-Hartley Trusts include apprenticeship and training programs administered by local Joint Apprenticeship and Training Committees ("JATC's") and funded by collectively bargained contributions from NECA contractors. NECA Chapters appoint Trustees to the Taft-Hartley Trust so that the employers are equally represented in the administration of the funds consistent with the requirements of the Taft-Hartley Act. 29 U.S.C. § 302(c)(5)(B) and (c)(6). Many of these funds are also "employee benefit plans" within the meaning of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). NECA's national office and 118 local chapters also advance the electrical contracting industry through advocacy, education, research and standards development.

I. Employer Contributions should Not be Considered in Measuring a Union's Financial Dominance

In designing the threshold test for determining whether Form T-1 reporting is required, OLMS is attempting to identify those trusts (1) over which a labor organization exercises management control, or (2) that are dominated by labor organization funds. *AFL-CIO v. Chao*, 409 F.3d 377, 389-90 (D.C.Cir. 2005). Accordingly, the Form T-1 reporting requirement applies under the Proposed Rule 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, either alone or in combination with other labor organizations,
>
> (1) selects or appoints 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 one-year reporting period.

84 Fed. Reg. at 25156 (an "Interested Trust"). The Proposed Rule further provides that "any contributions made pursuant to a collective bargaining agreement shall be considered the labor organization's contributions." *Id*. The term "labor organization" (or "Union") is defined in the LMRDA, 29 U.S.C. § 402(i).

NECA continues to be baffled by OLMS' insistence that contributions made by an employer under a collective bargaining agreement ("CBA") are treated the same as contributions by a Union for purposes of measuring the Union's "financial dominance." It is simply wrong to equate employer contributions with Union contributions for purposes of the 50% rule. The basis for OLMS's attribution rule appears to be its sweeping conclusion that because an employer's contributions to an Interested Trust might otherwise be paid to Union members in the form of higher wages, these employer contributions should be treated as Union contributions for purposes of measuring the Union's financial dominance. *See* 67 Fed. Reg.79280, 79283 (Dec. 27, 2002).

It is simply wrong to assert that employer contributions to an Interested Trust would be paid to Union members as wages if not paid to the trust. Moreover, employer contributions to benefit funds are never Union money. Employer contribution rates are set through the dynamic, arms-length, and highly regulated process of collective bargaining. Employers are never required to agree through the collective bargaining process or to make any concessions, and labor laws prohibit Unions from dominating these negotiations. 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. An employer who negotiates for lower contributions to a benefit program may and will use that savings for any purpose consistent with that employer's business objectives, including investing in real assets, property, or better technology and equipment, hiring more management employees, or simply increasing its profit margin. It is simply not true that an employer will always choose to pay higher wages to Union members any time it lowers its benefit contribution obligations. Unless the Union can unilaterally choose how to allocate employer contributions among Interested Trusts or employee wages, we believe there is no legal or other basis for treating employer contributions as tantamount to Union contributions for purposes of measuring a Union's financial dominance over a benefit trust.

Moreover, we note that in the context of ERISA-covered funds, it is well settled that once an employer makes contributions to an ERISA-covered trust ("ERISA Trust"), those assets become "assets of the plan" ("Plan Assets"). *See* DOL ERISA Advisory Opinion 93-14; Preamble to Prohibited Transaction Exemption 76-1, 41 Fed. Reg. 12740 at 12741 (Mar. 26, 1976). Moreover, employer contributions that are initially subtracted from an employee's wages may become "Plan Assets" even before such time as they are paid to that trust. 29 C.F.R. §

2510.3-102(a)(1). 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). It is wrong as a matter of law to equate employer contributions with Union contributions and to consider them in the calculus that measures a labor Union's financial dominance of an Interested Trust. ERISA-covered Plan Assets have their own legal status under ERISA separate from Union Funds. In this regard, ERISA confers legal status on ERISA Trusts and allows them to sue and be sued. ERISA § 502(d)(1). Moreover, several courts have considered whether an ERISA Trust may be considered to hold "Union funds" for purposes of the LMRDA and have rejected this view, holding that they are "Plan Assets" and cannot be treated as Union 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 Trust 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 union funds.); *c.f., Local 144 Nursing Home Pension Fund v. Demisay*, 112 S. Ct. 2990 (1992). The attribution rule insults and ignores employers contributing to the Interested Trusts, treating them as mere puppets of the Unions. It also ignores the Taft-Hartley Act's equal representation requirement as a means by which Congress believed independent employers are a ballast to Union domination of the Taft-Hartley Trusts.

We strongly urge OLMS to remove this attribution rule under the 50% test from the final rule as having no basis in law or in the practicalities of the collective bargaining process.

As referred to above, there is one context in which we agree that an employer's contributions to An Interested Trust could be considered tantamount to Union contributions. In some cases, as a result of collective bargaining, an employer may agree to make aggregate contributions to Interested Trusts, but may give the Union discretion to allocate those contributions among a number of Taft-Hartley Trusts. For example, an employer may agree to contribute $10.00 per hour for each Union member for benefit contributions. In turn, the union will have the discretion to allocate the $10.00 among various Taft-Hartley Trusts designated in the CBA. We agree that where a Union retains this discretion to allocate employer contributions among related Taft-Hartley Trusts, those contributions could be legitimately considered in measuring whether Union funds "dominate" the trust because of the Union's degree of control over the funds. However, we can think of no other set of circumstances that would justify equating employer contributions with Union contributions for purposes of measuring whether the Union contributes 50% or more of a Taft-Hartley Trust's annual receipts.

II. OLMS has not Recognized the Burden Form T-1 Imposes on Trusts and the Difficulty Labor Organizations will have in Obtaining Necessary Information

The obligation to complete and file the Form T-1 falls on the Union and not the Interested Trust. However, as a practical matter, given the level of detail and specific financial data required in order to file a Form T-1, the Union will be dependent upon the Interested Trust, in

almost all cases, to provide the Form T-1 information. OLMS has received comments regarding a labor organization's inability to obtain information from the Interested Trust and its potential liability where a covered Interested Trust refuses to provide Form T-1 information. In response to these comments, OLMS stated in the preamble to the 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. at 25140. This statement underscores the fundamental impropriety of treating employer contributions as evidence of Union domination. The fact that an Interested Trust may decide not to give the information required by the Form T-1 to the Union at its discretion (which the Union 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 suggests that the Interested Trust is not in fact under the "control" and "dominance" of the Union.

A. Interested Trust Information May be Confidential and Proprietary to the Trust

We believe that OLMS has underestimated the significant potential that a Union will not be able to obtain necessary information from an Interested Trust for purposes of Form T-1 reporting. Detailed information regarding the trust, such as the total assets, total liabilities, total receipts and total disbursements, and "major" contributions and disbursements, is confidential information that belongs exclusively to the trust. Many trust instruments provide that the trust's information is confidential. Also, trusts may be subject to non-disclosure agreements that provide that the trust's information is proprietary business information not subject to disclosure. Therefore, we believe that in many cases the trustees of an Interested Trust will have a legal obligation to protect the trust's information from disclosure to the Union or the public and will not be able to respond to the Union's requests for the data.

ERISA Trusts in particular are subject to ERISA's detailed disclosure scheme. While ERISA does contain several provisions requiring the disclosure of certain information about the ERISA Trust to a plan participant and a contributing Union, the information that is subject to disclosure to plan participants and contributing Unions is limited. *See, e.g*., ERISA § 104(b)(4); 101(k). This information is generally limited to plan documents, summary plan descriptions, trust agreements, Form 5500 reports, governing plan contracts, actuarial reports and other specific disclosures. An ERISA plan would not be statutorily required to disclose detailed information about individual trust receipts and disbursements and much other Form T-1 information to a contributing Union.

B. ERISA Fiduciary Breach and Prohibited Transaction Issues

We think that OLMS has failed to adequately address the concerns of many commenters who pointed out that, in the case of an Interested Trust that is an ERISA Trust, the trust's provision of information to the Union 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 Union

whose members are covered by the plan. ERISA § 406(a)(1)(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 union 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 impeded compliance with the LMRDA… ." *Id*.

Many Interested Trust's covered by ERISA will not be comfortable relying on this preamble language, which was not based on any specific facts presented to the DOL and is not a formal opinion of the EBSA. This issue would largely be resolved if OLMS determines to exempt all ERISA covered plans from Form T-1 reporting, not only those that file a Form 5500, as explained in Section IV below.

Moreover, when an Interested Trust that enters an agreement with a Union to receive reimbursement for costs incurred in providing Form T-1 data to a Union, Union 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 recusal of all of the union trustees may present an equal representation issue under the Taft-Hartley Act. 29 U.S.C. §186(c)(5)(B). We believe that OLMS has failed to consider the ramifications of this recusal problem.

In order to deal with the very practical problem that we believe many Unions will face in getting required information from the Interested Trust, at a minimum, OLMS should articulate a "good faith" exception from the requirement to report Form T-1 information in any case in which an Interested Trust reasonably refuses to provide required information to the Union.

C. Unions May not Know whether a Given Trust is Subject to T-1 Reporting

We also believe that OLMS has underestimated the inability of labor organizations, on whom the reporting obligation falls, 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 Proposed Rule, 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) having 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.

Again, as explained above, the labor organization, in almost every case, will be dependent upon the trust to provide it with the Form T-1 reporting information. Moreover, we believe that in many cases, a labor organization that may technically have the obligation to file a

Form T-1 will not have sufficient information to *even make a determination that the trust is subject to T-1 reporting*. In part, this is because of OLMS's formulation of the test that a trust must be reported if a labor organization "alone or in combination with other labor organizations" selects a majority or trustees or contributes 50% of the trust's receipts. Where multiple labor organizations contribute to a trust that are not affiliated (and may appoint trustees), how will each labor organization know that all of the contributing labor organizations together select a sufficient number of trustees or together contribute sufficient contributions so as to trigger T-1 reporting? Unions will certainly know what trusts they contribute to, but they often do not know every other Union that may contribute to an Interested Trust and they will commonly not know the extent of another Union'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 Union members because it will not know the extent of *non-Union* members benefited by the trust, or the extent of *other* Union 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 certain management and financial tests in fact will render many labor organizations completely unable to determine whether T-1 reporting even applies to trusts they contribute to. Even if a Union employee sits on the governing board of an Interested Trust, and has such a list, that list is the confidential information of the charity which the individual will be prohibited from using or further distributing as the entity's confidential information.

D. Non-Statutory Consideration of Multiple Unions in Measuring Governance Authority and Contributions is Unworkable

We note that the "alone or in combination with other labor organizations" language that appears in the "management control" and "financial dominance" portions of the test for T-1 reporting does not appear in section 3(l) of the LMRDA and are inconsistent with section 3(l). In this regard, 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.

Thus, section 3(l) looks for trusts that are created or established *by a single Union* (or the Union 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 Union.* Section 3(l) itself does not envision aggregating multiple Unions together to evaluate whether the trust is a trust in which *multiple* labor organizations are interested. We believe that a test for Form T-1 reporting that would be consistent with section 3(l) would look for management control and financial dominance *by a single Union*, not for management control and financial dominance by multiple Unions that may be unaffiliated and unaware of each other. We believe that OLMS may have exceeded its statutory authority in requiring Form T-1 reporting for trusts that may be "controlled" and "financially dominated" by multiple Unions when aggregated together, but are not so controlled and financially dominated by *any single Union*.

This problem, of a Union not being able to determine--on its own--whether the Form T-1 reporting test is met, points to the very real and practical fact that the obligation to administer and file the Form T-1 will fall almost entirely on the Interested Trusts themselves, not the labor organization. Even if the Interested Trusts are not prohibited by law or contract or otherwise decide they will not provide the information, Interested Trusts will not only have to provide detailed reporting information to the filing labor organization for purposes of completing the Form T-1, but they will also have to do the mathematical calculations of the 50% test to determine the percentage of Union contributions (including employer contributions on behalf of Union members). Many Unions will not be able to determine, on their own, whether key elements of the reporting test are met. This creates an unworkable rule and OLMS should eliminate the requirement that multiple Unions should be combined for purposes of determining whether a Form T-1 is required.

III. ERISA Trusts Should be Exempt from T-1 Reporting

NECA appreciates that the Proposed Rule exempts from Form T-1 reporting an ERISA Trust that files a Form 5500 under 29 U.S.C. section 1021 or 1024 (ERISA's provisions that require the plan administrator of an ERISA-covered plan to file an annual report with the Secretary of Labor). Nonetheless, NECA believes that this exception should be broadened to cover all ERISA Trusts, including those that rely on an exception from, or alternative to, filing the Form 5500 under DOL regulations.

As OLMS is aware, ERISA Trusts are subject to a "comprehensive and reticulated" regulatory scheme under ERISA. *Central States Pension Fund v. Central Transport*, *Inc*., 472 U.S. 559 (1985). 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," or persons who have a close relationship to the plan 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 its fiduciary requirements. ERISA § 409. 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 EBSA jurisdiction over ERISA-covered employee benefit plans, OLMS should not attempt to impose any new reporting requirements on ERISA-covered plans beyond the reporting and disclosures already required under ERISA. This is especially true since courts have determined that the employer contributions and other assets of an ERISA Trust are not assets of a Union and that the LMRDA does not apply to such assets. *Hearn*, 603 F.3d at 901-903. Simply put, the Proposed Rule seeks to extend its requirements to ERISA Trusts with respect to which the LMRDA's fiduciary duties do not reach. In light of the extensive regulation applicable to ERISA plans, OLMS should exclude all ERISA-covered plans from Form T-1 reporting, including those ERISA plans that satisfy their annual reporting obligation under part 1 of Title I of ERISA through an exception or alternative reporting method authorized by DOL regulations.

IV. OLMS Should Extend the Due Date of the Form T-1

The current due date of the Form T-1 is 90 days following the end of the labor organization's fiscal year. We understand that OLMS tied the due date to the fiscal year of the labor organization because other reports under the LMRDA, including the LM-2, incorporate due dates that key off the labor organization's fiscal year. However, we believe the current due date is problematic for several reasons.

First, as explained above, and if the Interested Trust is not prohibited from doing so or simply decides not to, the obligation to compile the required information will fall almost entirely on the covered trusts themselves. For this reason and as a practical matter, it will greatly ease compliance to tie the due date to the trust's fiscal year because the trust will have to transmit (assuming it can legally do that) information to the filing Union. Moreover, a period of 90 days, even if tied to the trust's fiscal year, is simply not long enough to perform the detailed reporting required by the Form T-1. Other comparable financial reports give a longer period of time to complete the filing. For example, the Form 990, filed by Interested Trusts, is due by the 15th day of the fifth month following the organization's fiscal year (May 15th for a calendar year organization). ERISA's Form 5500 is due by the last day of the seventh month following the plan's fiscal year (July 31st for a calendar year plan). ERISA § 104(a). Most large ERISA plans, including Taft-Hartley pension and welfare trusts, take the one-time voluntary extension to file the Form 5500 which gives them an additional two and a half months. Therefore, most large ERISA-covered plans would not be required to file a Form 5500 until October 15th for a calendar year plan.

The ERISA Form 5500 reporting deadline raises another practical problem in connection with the Form T-1 deadline. Namely, OLMS has generously provided a Form T-1 reporting exemption for those plans that are required to and do file a Form 5500 under ERISA. However, ERISA plans are not required to file a Form 5500 until the last day of the seventh month following the plan year (July 31st for a calendar year plan), and most large ERISA plans, take advantage of a voluntary extension of time that extends the deadline until October 15th. Thus, an ERISA Trust that operates on a calendar year will not know until July 31st or October 15th whether it qualifies for the Form T-1 reporting exception for plans that file a Form 5500. For this reason, we believe the Form T-1 deadline should be, at a minimum, correspond to

ERISA's filing deadline of the last day of the seventh month following the Interested Trust's fiscal year.

While we note that the Proposed Rule permits the use of the Interested Trust's most recent financial information in order to decrease the financial burden on Interested Trusts, that will create a mismatch in the information provided for purposes of the LM-2 and T-1. That mismatch will obviate the T-1's purpose of prohibiting the circumvention of Union disclosure obligations because the information cannot be compared appropriately with Form LM-2 information. However, without the exception the costs of compliance with the Proposed Rule will dramatically increase, thereby depleting the funds of the Interested Trust's charitable and beneficial purpose.

V. Organizations that File a Form 990 should be Exempt from T-1 Reporting

The Form 990 is filed every year with the IRS by most organizations that qualify for exemption from taxation under section 501(c) of the Internal Revenue Code (the "Code"), including 501(c)(3) nonprofit charitable organizations. The Form 990 reports detailed information to the Internal Revenue Service about the nonprofit organization, its financial status and transactions, and its administration.

Significantly, the Form 990 requests much of the same, and even more of the, information that 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 is already largely 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. Creating another report that duplicates the information that should already be reported by the entities cited as examples of the circumvention and evasion of the LMRDA Title II reporting requirements obviate the need for the Form T-1 and its many associated burdens.

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 Union. 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, the compensation from Related Organizations to those individuals must also be listed. Additional information on Schedule J even includes questions as specific as to whether those individuals were provided first class or charter travel. Part VII. B 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 Union will be making contributions to a tax exempt

Interested Trust, Part VII 1.d requires that revenue from Related Organizations (like a sponsoring Union) be reported, and Part X. Line 22 requires a reporting of loans to trustees of an Interested Trust. 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.

Most importantly, Part IV, Lines 25.a & b of the Form 990 require the reporting of excess benefit transactions which have occurred under Code section 4958. Like the prohibited transaction rules of ERISA, section 4958 prohibits a person or entity who has "Substantial Influence" (a "Disqualified Person") from entering into an "Excess Benefit Transaction" with an entity that is exempt from tax under section 501(c)(3) or 501(c)(4) or of the Code (a "501(c)(3)"). "An excess benefit transaction generally is a transaction in which an economic benefit is provided by an applicable tax exempt organization on directly or indirectly, to or for the use of any disqualified persons, and the value of the economic benefit provided by the applicable tax-exempt organization exceeds the value of the consideration (including the performance of service) received for providing the benefit" Form 990 Instructions, pg. 86. If such a transaction has taken place during the fiscal year or any prior year, it must be reported on the Form 990 Schedule L.

That Schedule requires a great deal of information similar to the proposed Form T-1 regarding those Excess Benefit Transactions. For example, in the case of a Union Trustee or other person or entity that had "Substantial Influence" over the 501(c)(3) that got more than he or it should have, thereby constituting an Excess Benefit Transaction, the Schedule L "Transactions With Interested Persons" requires the reporting of the name of the individual, the relationship to the 501(c)(3), a description of the transaction (including the amount), and whether the transaction had been corrected. Loans to and from the interested persons, including the purpose, the principal amount, the balance due, whether the loan is in default, whether it was approved by the board or committee, and whether it was made pursuant to a written agreement all are required to be reported on Part II of the Schedule L of the Form 990. Part III of Schedule L also 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 repetitive 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. Thus, DOL should – at the very least – not require a Union to file a Form T-1 for entities that are tax exempt under sections 501(c)(3) or (4) of the Code.

We urge OLMS to exempt any organization that is required to and does file an annual Form 990 from the requirement to file a Form T-1. Again, 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 burdensome, expensive and detailed financial reporting requirements. At a minimum, we believe that any organization that files a Form 990 should be able to submit the Form 990 directly to OLMS in satisfaction of its obligation to file the Form T-1.

VI. Form T-1 Itemization Exception for Benefit Payments Should be Retained but Modified

NECA greatly appreciates that OLMS included the exception for benefit payments from the requirement to itemize "major" disbursements of $10,000 or more on Schedule 2. As written currently, the exception provides, "the labor organization is not required to itemize benefit payments on Schedule 2 from the trust to a plan participant or beneficiary, if the detailed basis on which such payments are to be made is specified in a written agreement." 84 Fed. Reg. at 25164. However, we believe the exception is too narrow to cover all situations involving the ordinary payment of benefits from Interested Trusts. In this regard, many of the benefit payments made by Interested Trusts may not be specified in a written agreement. Instead, the basis for the benefit payment may be set forth in a related document governing the trust, such as a plan summary or schedule of benefits that may not, in every case, be specifically incorporated into a written agreement. Accordingly, NECA respectfully asks that the itemization exception for benefit payments in the Form T-1 instructions simply provide the following – "Additionally, the labor organization is not required to itemize on Schedule 2 benefit payments from the trust for the benefit of a plan participant or beneficiary."

VII. Form T-1 Itemization Exception for Contribution Payments Should be Modified

Similarly, NECA is grateful that OLMS included the exception for contribution payments pursuant to a CBA from the requirement to itemize "major" receipts of $10,000 or more during the reporting year. 84 Fed. Reg. at 25164. We share the comments made by others to the 2008 Form T-1 rule who "expressed concern that reporting of employer contributions to trusts could reveal the extent of [their] business operations to competitors and unnecessarily affect [their] business interests." 73 Fed. Reg. 57411, 57425 (Oct. 2, 2008). We share those concerns.

Employers make contributions to pension, health and welfare, and apprenticeship trusts. Those contributions are typically made in an "amount per hour" basis pursuant to a collective bargaining or other agreement negotiated between the employer and the and labor organization. As a result, employers consider the amounts of such contributions — even if only in the aggregate — to be proprietary and confidential. If those figures were publicly available, they not only would reveal the benefit burden of an employer's business, but could also reveal the number of labor hours performed. Both the fringe benefit amount and labor hours performed constitute confidential and proprietary information that could be damaging to the employer if known to the employers' competitors.

For this reason, we are thankful that OLMS included the contribution exception from itemization, and we urge OLMS to retain it in the final rule. Nonetheless, NECA wishes to point

out that CBAs are not the only writing in which contribution obligations to a Interested Trust may be memorialized. Contribution obligations may be specified in "participation agreements" entered between the plan and the employer, or in various forms of side letters or other ancillary agreements. Accordingly, NECA requests that OLMS broaden the itemization exception modestly so that itemization is not required on Schedule 1 "if the payment qualifies as an employer contribution for purposes of the Taft-Hartley Act or ERISA."

VIII. Alternative Reporting Method for Trusts that Receive an Audit

NECA appreciates that OLMS has proposed that if a trust receives an independent audit that meets certain audit conditions modeled on ERISA's independent audit requirements, the trust may submit that audit in an abbreviated T-1 filing. *See* 84 Fed. Reg. at 25157. NECA respectfully requests two refinements to this alternative reporting option.

First, many of the trusts that would be required to file a Form T-1 under the Proposed Rule are subject to the Labor Management Relations Act, also known as the Taft-Hartley Act. Under section 302(c)(5)(B) of the Taft-Hartley Act, benefit plans that are sponsored jointly by a labor organization and employer representatives are subject to a requirement to receive an annual audit. 29 U.S.C. §186(c)(5). To the extent that an Interested Trust receives an audit that meets the requirements of the Taft-Hartley Act, and the Interested Trust provides that audit to the Union, the Union should be permitted to submit that audit report as an alternative to filing a Form T-1. This is consistent with the protections Congress felt sufficient to protect participants and beneficiaries when it passed the Taft-Hartley Act. Moreover, the Interested Trusts that are required to complete a Taft-Hartley audit, are also generally covered by ERISA's reporting and fiduciary standards, and are also required to file a Form 990 under the Code.

Second, OLMS made a significant improvement to the requirement to separately itemize trust disbursements and receipts when it determined to exempt benefit payments to a beneficiary of the Interested Trust as well as contributions made by a contributing employer pursuant to a CBA, from the requirements to itemize "major" trust disbursements and receipts. Nonetheless, the reporting alternative for trusts that receive an independent audit does not appear to provide parallel relief from the requirement to itemize these disbursements and receipts. In this regard, the comparable requirement in the audit reporting alternative provides the following required audit element – "a statement of trust receipts and disbursements aggregated by general sources and applications, which must include the names of the parties with which the trust engaged in $10,000 or more of commerce and the total of the transactions with each party." 84 Fed. Reg. at 25157. We believe that OLMS may have intended to provide similar benefit and employer contribution relief from the itemization requirement in the audit provision, but may have failed to do so by oversight. We ask that OLMS make clear that these types of payments (benefit payments and contributions) are intended to be treated similarly under both the audit alternative and on Schedules 1 and 2 of the T-1 Form, and itemization for these receipts and payments is not required in either context.

Finally, OLMS included a reporting exception from line 16 which would report losses, shortages or other discrepancies in finances during the reporting period. Importantly, line 16 contains a reporting exception for delinquent contributions from employers, delinquent accounts receivable, losses from investment decisions or overpayments of benefits. 84 Fed. Reg. at

25162. However, the audit is required to include notes to the financial statements that disclose, among other things, "losses, shortages, or other discrepancies in the trust's finances." 84 Fed. Reg. at 25157. The notes to the financial statements required for purposes of the audit alternative do not include the exception for delinquent contributions, delinquent accounts receivable and overpayments of benefits. We ask OLMS to clearly articulate that any exceptions from Form T-1 reporting are likewise available under the audit alternative.

* * *

We appreciate the opportunity to provide these comments to OLMS. We welcome the opportunity to further explain or answer any questions by our comments.

Sincerely,

Marco A. Giamberardino
Executive Director, Government Affairs