May 5, 2008

Kay H. Oshel
Director of the Office of Policy, Reports and Disclosure
Office of Labor-Management Standards
U.S. Department of Labor
200 Constitution Avenue N.W.
Room N-5609
Washington, D.C. 20210

Re: Notice of Proposed Rulemaking RIN 1215-AB64: T-1 Forms
Comments of The National Electrical Contractors Association

Dear Director Oshel:

The National Electrical Contractors Association ("NECA"), through its counsel, hereby submits comments to the Department of Labor’s proposed rule to implement a T-1 reporting requirement. NECA is a construction trade association composed of more than 4200 electrical contractor members served by 119 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 agents 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 a number of health care funds for their unionized employees, including the NECA/IBEW Family Medical Care Trust Fund. NECA contractors have also negotiated, through their NECA Chapters, participation in the NECA/IBEW National Electrical Benefit Fund, a defined benefit pension plan, as well as various local defined contribution retirement plans to which contractors contribute. In addition, NECA is a co-sponsor of the National Joint Apprenticeship and Training Committee ("NJATC") for the electrical industry, which supports local apprenticeship programs that train more than 42,000 electrical apprentices and are the sole source of significant in-service training for journeyman electricians. The apprenticeship training programs are administered by local Joint Apprenticeship and Training Committees ("JATC’s") and are funded by collectively bargained contributions from NECA contractors. All of these funds are jointly-trusted pursuant to the Taft-Hartley Act, i.e., employers must be equally represented in the administration of the fund. (29 U.S.C. § 302(c)(5)(B) and (c)(6).) NECA’s national office and 119 local chapters also
advance the electrical contracting industry through advocacy, education, research, and standards development.¹

The rationale for the DOL's proposed regulation is that the T-1 is necessary because trust funds, including jointly-trusteed Taft-Hartley funds, are mere puppets of labor organizations that may be used by unions to divert monies for improper purposes and avoid their LM-2 reporting requirements. NECA submits these comments to address this assumption as applied to jointly-trusteed Taft-Hartley funds in which contractors represented by NECA Chapters participate.

The Secretary of Labor may require union reporting on a Taft-Hartley trust only if: (1) the union either established the trust or appoints at least one trustee or member of the governing body (29 U.S.C. § 402(l) and 438); and (2) the reporting is necessary for the purpose of preventing the circumvention or evasion of the LMRDA's requirement that unions report on their own financial condition and operations (29 U.S.C. § 431(b.).) Meeting the first part of the test does not establish that reporting is necessary to prevent evasion of the LMRDA's reporting requirements. There must be some indication that the union has sufficient actual control over the trust that the union could run financial transactions through it that would have been reportable had the union engaged in them directly. See AFL-CIO v. Chao, 409 F.3d 377, 386, 390 (D.C. Cir. 2005). NECA respectfully submits that there is no rational basis for concluding that a T-1 requirement for jointly-trusteed funds is, in fact, necessary to prevent evasion of LMRDA reporting requirements.

The DOL relies heavily on the presumption that employer contributions to jointly-trusteed funds are tantamount to union contributions for the purpose of establishing union "domination" of the trust. This conclusion has no basis in fact. Unions cannot unilaterally compel employers to make fund contributions. These contributions are the product of the give and take of collective bargaining. The obligation to bargain under the National Labor Relations Act does not require an employer to agree to any proposal or to make a concession. Employers have the ability to refuse to agree in bargaining to fund a trust that is not operated in accord with its legitimate purpose. In that sense, employers have as much, if not more, financial control over trust funds than unions do. In the end, employer trust fund contributions are part of the economic package to which the employer has agreed. That economic package comes out of the employer's bottom line. From the standpoint of a NECA contractor or employer-selected trustee, the trust is not beholden to the union(s) for its funding, but to the participating employers.

Similarly, it is pure speculation to say that an employer's fund contributions are, in effect, "union members' funds" because they "might" have been paid directly to employees in the form of wages or benefits if they were not paid to the fund. While this conclusion may have been given some credence by the court in AFL-CIO v. Chao, employers did not participate in that case. It might just as easily be said that monies committed to trust fund contributions might

¹ More information about NECA may be found at www.necanet.org.
otherwise have been used to invest in new technology or to increase compensation for non-bargaining unit personnel.²

Union control also may not be inferred from the assumption that pension, health, apprenticeship and other jointly-trusteed funds are established for the benefit of “union members” because these funds are not perquisites of union membership. Employee fringe benefits are not, and never have been, viewed as an internal union matter like union dues and initiation fees. Moreover, it is unlawful for a union (or an employer) to discriminate among employees in a bargaining unit with regard to terms and conditions of employment based on membership or non-membership in the union. (29 U.S.C. § 158(a)(3) and (b)(2).) Participation in a jointly-trusteed fund is an employer-paid benefit for all of the employer’s employees who are represented by the union.

Since collectively bargained fund contributions come out of the employer’s pocket, employers have a strong interest in ensuring that these contributions are used for legitimate purposes. It is not reasonable to assume that a NECA contractor (or any employer) will agree to an economic package that includes contributions to, for example, an apprenticeship training fund or a health and welfare fund, but that contributing NECA contractors who also serve as fund trustees will have no interest in whether or not those funds are actually used for that purpose. In particular, NECA contractors are extremely concerned with the disposition of the assets of defined benefit pension funds because misuse of these assets could create serious unfunded pension liability for the contractors.

In addition, a union’s success in negotiating an employer’s obligation to contribute to a jointly-trusteed fund is not an indicator of the union’s control over the fund. While a union may have used its bargaining power to negotiate the terms of the trust (within the bounds permitted by law) and to negotiate employer contributions, this bargaining power does not extend to the administration of the trust once it is established. The operation of jointly trusted funds is governed by a number of legal requirements specifically designed to avoid labor (or management) domination of the trust, including the Employee Retirement Income Security Act (“ERISA”).

The Department of Labor assumes with no apparent justification that the fiduciary obligations of trustees under ERISA has no effect on the administration of jointly-trusteed funds. ERISA was enacted in 1974, many years after the improprieties described by the McClellan Committee and relied upon by the DOL. Moreover, the DOL’s proposal does not specifically identify any misconduct by the trustees of a jointly-trusteed fund. Although the DOL apparently relies on the same anecdotal evidence for the 2007 proposed rule that it relied on for the 2003

² The requirement that the various funds in which NECA contractors participate be jointly-trusteed arises from the fact that they would not, otherwise, fall within the exception in the Taft-Hartley Act to the prohibition on payments from the contractors to the union(s). See 29 U.S.C. 302(c)(5). The IBEW also makes available to its members certain benefits that are paid for out of union dues. These benefits are not a product of collective bargaining and are not funded by contractors. They are not, therefore, jointly-trusteed funds under the Taft-Hartley Act.
proposed rule addressed in AFL-CIO v. Chao, both the 2003 proposed rule and the 2006 proposed rule contained an exception for employee benefit plans that filed a Form 5500 Annual Return/Report under ERISA.

The DOL’s assumption that, not only do trustees ignore ERISA, but that, despite ERISA, jointly-trusted funds are a hotbed for abuse, does not reflect reality. As ERISA fiduciaries, trustees are obligated to manage the plan solely in the interest of the participants and to invest plan assets prudently.³ ERISA imposes substantial liability on persons who violate their fiduciary obligations, including criminal penalties.⁴ NECA can attest that NECA itself, NECA Chapters and the employer-appointed trustees take their obligations under ERISA very seriously.⁵

NECA provides ERISA training at its national Labor Relations Conference. The next conference will be devoted to ERISA. As a service to its Chapters and their contractor members, NECA retains counsel to answer questions regarding ERISA obligations. NECA also publishes notices to NECA Chapters and their members on ERISA issues as they arise. In addition, NECA

³ 29 U.S.C. § 1104(a)(1). ERISA applies to a variety of plans in which unions are involved, including jointly-trusted pension plans, health plan and apprenticeship plans. A person is a “fiduciary” under ERISA to the extent he or she exercises discretionary authority to manage the plan or the disposition of its assets. 29 U.S.C. § 1002(21)(A). This definition necessarily includes trustees but also encompasses, for example, administrative committees that make discretionary decisions regarding entitlement to benefits or the application of plan rules. The definition also includes persons who render investment advice to the plan for a fee. Prohibited transactions under ERISA include transactions with unions or union officials. These prohibited transactions, and the exceptions to them, are defined and regulated by the Employee Benefits Security Administration of the DOL.

⁴ Criminal violations include willful violation of ERISA reporting, disclosure, recordkeeping and bonding provisions (ERISA Sec. 501, 29 U.S.C. § 1331), theft and embezzlement from an ERISA plan (18 U.S.C. § 664), false statements or concealment of facts in regard to documents required by ERISA (18 U.S.C. § 1027), and offering, accepting or soliciting a thing of value to influence the operation of an employee benefit or welfare plan (18 U.S.C. § 1954). These penalties include both fines and jail time, and obviously provide a powerful deterrent to the kind of conduct cited by the DOL.

⁵ The courts have not been so cavalier in assuming that trustees of union-sponsored funds are not capable of acting independently from the union. As stated by the U.S. District Court for the District of Columbia, “the distinct judicial personality of an entity is not merely a legal nicety. Unless there is strong evidence to the contrary, we must conclude that such boundaries were intended to have some meaning, and they are not to be casually disregarded.” Berger v. Ironworkers Reinforced Rodman Local 201, 852 F.2d 619, 621 (D.C. Cir. 1988), cert denied, 490 U.S. 1105 (1989) (jointly-administered joint apprenticeship training committee not liable for union discrimination without actual evidence of agency). See also NLRB v. IBEW, Local 429, No. 07-1005/1107/1279 (6th Cir. Jan. 31, 2008), slip op. at 3 (“It is unclear to us how a [joint apprenticeship training] Committee composed of an equal number of union and employer representatives could be any more an agent of the Union than of the employers.”) Indeed, even in AFL-CIO v. Chao, on which the DOL heavily relies, the court emphasized that the DOL may not merely assume, based on union sponsorship of a plan, that the union dominates the plan absent actual evidence. The court gave some credence to the assumption that employer contributions are, in effect, employee’s money to support the conclusion that the trusts in question may fit the definition of a trust subject to regulation, but not that there was sufficient evidence to conclude that reporting on those trusts was necessary to avoid circumvention of the unions’ reporting requirements. 409 F.3d at 387-88.
and the IBEW jointly sponsor an annual Employee Benefits Conference which is available to anyone who is serving in the capacity of a trustee as well as Chapter managers, IBEW business managers and anyone affiliated with plan sponsors. Invited speakers include attorneys, financial advisors, actuaries, accountants and other professionals who are experts in ERISA and the administration of Taft-Hartley plans. Further, the Taft-Hartley trusts in which NECA contractors participate retain attorneys, accountants, actuaries, third party administrators, investment counselors and financial consultants. The financial consultants do periodic projections on funding and the amount of contributions needed to meet plan obligations in the future. The trustees are guided by the expert advice they receive. These advisors are paid by the trust, not the union. Some of these advisors are themselves ERISA fiduciaries. There is no responsible basis for concluding that these advisors are colluding with the union to divert trust funds for improper purposes.

In addition, the National Joint Apprenticeship Training Committee (“NJATC”) provides assistance to local apprenticeship training programs regarding ERISA obligations. (The NJATC is not itself an ERISA fiduciary or ERISA plan. It is an umbrella organization that is responsible for designing uniform curricula for the various apprenticeship training programs nationwide and providing support for those programs. The local JATC’s administer the individual apprenticeship programs. Each program is funded by its own Taft-Hartley trust.) The NJATC reports that it provides training courses in ERISA, fiduciary obligations, Taft-Hartley requirements and IRS requirements at its National Training Institute, which is held annually. Invited speakers include attorneys, representatives of the DOL and the IRS, and others schooled in ERISA plans. In addition, the NJATC provides similar presentations to trustees, JATC committee members, training directors, assistant directors, NECA Chapter managers and IBEW business agents at its regional seminars, which are given on a rotating basis two or three times a year. The NJATC also provides in-depth training on these subjects to new local JATC training directors and assistant directors at its new training directors seminar. In addition to being ERISA fiduciaries in some respects themselves, these individuals are responsible for carrying out decisions of the trustees and provide an extra line of defense against possible prohibited transactions or other fiduciary violations. The NJATC also produces a special newsletter for trustees to keep them abreast of legal, including ERISA, developments. The NJATC expends thousands of dollar per year educating local trustees. The local JATC committees also retain their own attorneys to advise on ERISA matters, and some also retain investment advisors. As a rule, the JATC’s are extremely conservative in their investment strategy.

The DOL cites numerous unidentified instances of “embezzlement” to support its conclusion that the fiduciary obligations of trustees under ERISA are insufficient to ensure proper use of the funds. By definition, however, embezzlement is covert and may not be detected by the most conscientious of trustees. Certainly, the embezzler would take whatever measures necessary to avoid detection and would not report the embezzlement on a T-1, an LM-10, an LM-30 (which already includes transactions with trusts) or any other form of disclosure.

The DOL’s support for the T-1 rule consists of individual instances of fraudulent conduct rather than any structural defect in the way that jointly-trusteed funds are operated that makes
them vulnerable to manipulation by either unions or employers. In order to justify the rule, the DOL simply assumes that this fraudulent behavior by some individuals is the norm and that employer trustees are either involved in it, indifferent to it, or simply dominated by unions. The DOL's rationale is an affront to the representatives of NECA contractors who are willing to serve on the boards of jointly-trusteed funds without any personal reward. In addition, this rationale unjustifiably creates the presumption that these funds, which are the vehicle by which unionized employees in the electrical industry receive health coverage, retirement benefits and job training, are rife with corruption and should be viewed with suspicion. This presumption is not healthy for the unionized electrical industry or the employees who benefit from these funds. Further, if the DOL implements a reporting requirement that is predicated on the assumption that employer trustees are negligent or even complicit in misdirecting funds in violation of their fiduciary duty, this will impede the recruitment of responsible contractor representatives to serve as trustees.

Therefore, NECA respectfully submits that the DOL should not impose, and does not have a sufficient statutory basis for imposing, a T-1 reporting requirement on jointly-trusteed ERISA funds.

Sincerely,

[Signature]

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