

September 20, 2010

Via Email director@fasb.org
Technical Director, File Reference No. 1840-100
FASB
401 Merritt 7
PO Box 5116
Norwalk, CT 06856-5116

RE: Proposed Comments
Contingencies (Topic 450)
Disclosure of Certain Loss Contingencies

Dear Technical Director:

This firm is counsel to the Mechanical Contractors Association of America, Inc. (the "MCAA"). The MCAA is an employer trade association of approximately 2,200 contracting firms involved in heating, air conditioning, refrigeration, plumbing, piping, and mechanical service. MCAA members sponsor, jointly administer and contribute to hundreds of construction industry collectively bargained multiemployer ("Taft-Hartley") defined benefit funds nationwide. Member organizations include the Mechanical Service Contractors of America, the National Certified Pipe Welding Bureau, the Plumbing Contractors of America, and the Manufacturer/Supplier Council.

Through our role as counsel, our firm has served, since 1964, as co-counsel to the Boards of Trustees of over sixty related employee benefit funds, primarily in the construction trades. We have advised on matters involving ERISA compliance, fiduciary responsibility, legal standards for plan design, participation, benefit accrual, vesting, and funding as well as other implementation and administration issues impacting the tax qualified status of such plans. We have also served as independent professional trustee, on the side of management, on multiple large multiemployer trust funds. Our experience has led us to serve as local counsel for several fiduciary liability insurers and as frequent lecturers for the International Foundation of Employee Benefit Plans and numerous trade associations.

We submit these comments as part of MCAA's multi-faceted analysis of the Financial Accounting Standards Board Exposure Draft, *Disclosure of Certain Loss Contingencies*. They are limited to amendments to Subtopic 715-80, Computations – Retirement Benefits – Multiemployer Plans.

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The proposals in Topic 450 and Subtopic 715-80 as they pertain to multiemployer defined benefit plan withdrawal liability should be withdrawn as they fail to reflect the scope of the public law in the United States pertaining to actual liability and how it is incurred and assessed. We submit that the current accounting standards are sufficient to achieve FASB's laudable goal of greater transparency and accurate, predictive information to users of financial We are not aware of any changed circumstances or widespread negative statements. consequences validating the need for such a radical qualitative change in the status quo, with potentially severe, unintended consequences and little corresponding gain in reliable and predictive disclosures. If an audit subject company has taken steps that would raise a claim of withdrawal liability (e.g. withdrawing from a plan and continuing operations in the jurisdiction without contributing), or has a present intention to do so, or has actual knowledge of a very rare type of mass withdrawal by others, then the potential liability should be disclosed. However, any broader disclosure burden on the construction industry based on speculative contingencies are inapt for its unique withdrawal liability rules. They present the real risk of negative collateral consequences that FASB should consider and work to avoid. Our firm, MCAA, and its coalition partners hereby respectfully commit to a collaborative and constructive working approach with FASB to achieve its goals.

FASB's Proposals Create Ambiguous Standards and Risks of Misinterpretation

Paragraph 450-20-15-2 contemplates expanding the disclosures in financial statements by adding obligations that <u>may</u> result from withdrawal from a multiemployer plan (through the application of Paragraphs 715-80-35-2 and 715-80-50-2) into the scope of Topic 450 for the reporting of loss contingencies. Further, the redraft of paragraph 715-80-35-2 removes the language, "If withdrawal under circumstances that would give rise to an obligation is either probable or reasonably possible" Similarly, the redraft of Paragraph 715-80-50-2 removes the language, "if it is either probable or reasonably possible"

As a preliminary issue, as highlighted by other commentators, FASB's proposed deletions create an ambiguity as to the standard that should be used for disclosures. This uncertainty is compounded by the conflicting statements contained within the Exposure Draft itself and the actual disclosure threshold. Deleting "probable or reasonably possible" from paragraphs 715-80-35-2 and 715-80-50-2 seems to give rise to a "remotely" possible standard, and yet does not conform with the "probable or reasonably possible" standard in effect by operation of Paragraph 450-20-50-IC. Absent the ambiguity, however, the "probable or reasonably possible" is the only realistic and workable standard and it should be restored.

FASB's Standards Miss the Mark of Disclosure Goals When Applied to Construction Industry Multiemployer Plans

In the introduction, FASB states that "[i]nvestors and other users of financial reporting have expressed concerns that disclosures about loss contingencies under the existing guidance on contingencies in Topic 450 do not provide adequate and timely information to assist them in assessing the likelihood, timing, and magnitude of future cash outflows associated with loss contingencies." With its proposals, FASB is seeking to identify risk to cash outflows for loss contingencies in financial statements, especially for those contributing to multiemployer plans such as construction employers. It is our view, based on this analysis and respectfully submitted that FASB's proposals do not meet its own mark. This is because the proposals do not adequately reflect the unique and complex statutory and regulatory rules pertaining to construction multiemployer plans, which are not comparable to single employer plans. It will not increase transparency or accuracy of the information provided to users of financial statements about the likelihood, magnitude, and timing of loss contingencies. If the unique nature of construction multiemployer plans are not adequately reflected in the standards, then until the FASB proposals are revised to respect those unique conditions the information that would be disclosed presents the real risk of being misleading in two ways - the liabilities are in no way incurred or claimed and, in any event, the amounts disclosed would be misleading because of time lags in reporting.

Employers with calendar fiscal years complete their statements by February or March of the following year. Multiemployer plans have various Plan year closings through the four quarters of the year. Therefore, construction employers that contribute to any number of plans annually will have coincident Plan Years and Fiscal Years only by chance. Furthermore, the actuarial certification process is lengthy and is based on data that is virtually guaranteed to be non-current by the time it is available to the auditor. This variable time lag further compounds the error of requiring disclosure irrespective of objective criteria leading to an actual assessment of a withdrawal liability claim. In essence, in a vast majority of cases, construction employers would be reporting speculative information about non-asserted claims, based on out-dated actuarial calculations.

It is Imperative that the FASB Standards Respect the Unique Legal Structure of Construction Industry Multiemployer Plans

With these flawed FASB proposals, construction employers would be required to disclose potential withdrawal liability even though it would not actually be incurred. Even if it were likely to be incurred and developed into an asserted claim, the FASB proposals do not recognize

the complexity of the liability calculations and exceptions that substantially mitigate or diminish the liability reported.

Unlike other employers, the construction industry employers that go out of business completely do not incur withdrawal liability, and even those that continue in business incur withdrawal liability only if, within five years from the cessation of the obligation to contribute, they engage in the same type of work in the same geographical area covered by the collective bargaining agreements under which the plans are maintained. For any period at issue, it will be known whether a construction employer has in fact withdrawn from a multiemployer plan in a way that incurred withdrawal liability. It will also be known whether a construction employer has a present intention to withdraw for the period in question. This highlights that these are objectively known events or occurrences within the sole control of the construction employer. For example, if a construction employer goes "open shop", then the withdrawal liability can be quantified, disclosed, and recognized as required. In any other circumstance it would simply be speculation by the accountant whether it is remotely possible and therefore would be misleading, unpredictive, and non-operational.

With a "remote" or "slight" standard, it is clear the multiemployer plan will have a tremendous burden in calculating each construction employer's withdrawal liability in every year. This does not achieve the predictive disclosure FASB is trying to achieve with the modifications. It should not be discounted that multiemployer plans are major investors also, one in the class of FASB's intended beneficiaries. The pension plans as a source of investment capital will diminish as a result of the proposals with little to no predictive value and increased administration and overhead costs.

FASB Standards Should Avoid Adverse Collateral Consequences

FASB's proposal may also interfere with the construction employers' access to financial credit by taking withdrawal liability, which is legislatively a very remote liability, and raising it to the level of an incurred claim. Similarly, construction employers may have difficulty obtaining surety bonds for the same reasons. If these unwarranted but highly negative adverse consequences were to follow because of the flawed disclosure standards, then the standards themselves present a very real risk of destabilizing the construction industry associated with these multiemployer plans.

If there was to be financial or surety contraction, the construction employers affected will not be able to qualify or may perform less work making participation in these plans less attractive. The diminished contributions to the plans as a result of the contraction will have a destabilizing effect. If the number of contributing construction employers or volume of work

diminishes, the remaining construction employers will be forced to fund a larger portion of the withdrawal liability affecting their plans' continuing viability.

Conclusion

In summary, FASB's proposed disclosures are not useful. They will have the effect of requiring all contributing employers to report potential withdrawal liability even if the chance of triggering the liability is merely "remote". All construction employers will have to disclose any potential liability without regard to the probability will occur and without regard to whether the potential impact on the construction employer. Remote possibilities or unrealized contingencies offer no predictive value to users of financial statements trying to ascertain the financial risk of a multiemployer plan; in fact, disclosing remote possibilities offers a skewed perspective on the stability of the contributing construction employers. Only a known liability, which can be objectively assessed is the appropriate standard to use for an audit period. FASB should state that the "probable" or "reasonably possible" standard applies and not the "remote" possibility standards. A workable standard is a much better predictive standard and one that can achieve FASB's intent in the proposed modifications of providing the users of financial statements an appropriate measurement of financial risk present in multiemployer plans.

Thank you for the opportunity to provide comments. We look forward to working with FASB on the issues over the coming months as Topic 450 and Subtopic 715-80 continue to move forward and receive constructive comments on workable solutions from our coalitions representing the construction industry's unique perspectives on the IASB and FASB proposals.

Respectfully submitted,

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