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November 1, 2010

Technical Director
File Reference No. 1860-100 and 1840-100
Financial Accounting Standards Board
401 Merritt 7
P.O Box 5116
Norwalk, CT 06856-5116

## RE: File Reference No. 1860-100 (cross reference to File Reference No. 1840-100)

On behalf of the 2,200 mechanical contractor members of the Mechanical Contractors Association of America (MCAA), I want to extend our appreciation to the FASB Board and senior staff for the consideration you have extended to MCAA and our allied Campaign for Quality Construction specialty construction groups in allowing us a very constructive role in your deliberation process on both Exposure Drafts 450 and 715.

Please indulge the following comment: I and my staff have been involved in construction industry rulemaking in a variety of private and public sector forums for many years, from private contract document development to Federal regulatory processes of many types, and based on this experience, we commend FASB for the constructive and collaborative way you have vetted and taken input on EDs 450 and 715. In addition, over the past several months we have observed top FASB staff venture into some adversarial forums, state the FASB proposals most equably, and then handle some tough questions with the utmost professionalism. FASB has gained stature in our industry's eyes, particularly in the way the views of affected parties are solicited and received, and MCAA commends you for this.

On the specifics of the matter MCAA of course agrees with FASB's stated goal of increasing transparency in financial statements to adduce reliable and useful information about multiemployer defined benefit pension plan liability of contributing employers. However, on most of the specifics of both ED 450 and 715, we submit that the proposals fail to meet that goal, and so we disagree strongly because of that, and because of the severe unintended collateral consequences that will follow from failing to meet that goal.

In the body of these comments, MCAA will first answer the specific questions posed in ED 715. After that, we will recapitulate our main arguments relative to manifold problems with the withdrawal liability aspects of both ED 450 and 715, and discuss some of the other details of ED 715, all of which will, we believe, substantiate our concluding request of FASB, which is as follows:

MCAA requests that the FASB Board withdraw ED 450 and re-deliberate on the multiemployer pension plan liability loss contingency as it pertains to construction industry multiemployer plans, which at 54.3%, or 824 plans, are the majority of the 1,517 multiemployer plans in the country (PBGC Pension Insurance Data Book 2009). Moreover, MCAA requests that in that re-deliberation FASB structure a proposal that is based on the majority rule, rather than a one-size-fits-all-industries model based on the minority of multiemployer plans nationwide. Similarly, once ED 450 is amended to reflect the objective facts and procedures that must be realized for a withdrawal liability assessment to be levied against a contributing employer in the construction industry, then we would ask that FASB likewise withdraw the routine withdrawal liability disclosure aspects of ED 715, and re-deliberate the remaining disclosure items in that draft in light of the construction industry's comments reflected herein and in other complementary comments provided by other construction industry groups. Finally, MCAA and our Campaign for Quality Construction coalition partners would offer to continue to be actively engaged with FASB in those re-deliberations.

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Following are our summary responses to the questions posed in ED 715:

Question #1. The quantitative and qualitative disclosures will not result in either more useful or more transparent disclosure of a contributing employer's liability in the subject pension plans. "Transparency" is only a means to an end, not a virtue on its own. In this case, "more" is very misleading and much worse than "less." Similarly, "useful" in accounting disclosure has a very specific and disciplined connotation – the information has to be accurate, reliable, timely and of predictive value to those who would rely on it in making material and well-informed judgments based on that disclosure. When it comes to the routine disclosure of withdrawal liability for construction industry contributing employers, the FASB proposal falls very wide of these marks. The basic problem is that the FASB proposals of routine disclosure of withdrawal liability are flawed because they ignore the rock-hard reality of the law pertaining to those plans set out by the U.S. Congress. That law is part of the organic structure of those plans. Any proposal that fails to accede to that organic reality in this most important respect will perforce miss the mark on accuracy and usefulness.

Question #2. Requiring disclosure of withdrawal liability based on any adverbial description of likelihood fails to acknowledge the very objective and prescriptive rules set out for incurring that liability in the law pertaining to the majority of multiemployer plans. That objective reality is: the audit subject must withdraw from a plan to which it previously had a contractual obligation to contribute (go open-shop in any area of work within five years of last contributing). Then, the plan trustees in that area must take cognizance of that withdrawal and assert a potential claim. And then, the employer and the plan must agree on whatever liability will be settled on and paid in line with several very unique rules pertaining to that final assessment. It's an objectively known event that leads to an attenuated assessment procedure, not an extrinsic event, or action by a third-party, that is unpredictable to the audit subject. Any proposal that would require routine disclosure in the absence of these objective procedures will be misleading and therefore comprise transparency of the worst type; by definition, misleading information is not useful in decision making.

It is not a proper solution to say that reservations can be duly added onto the over-broad disclosure, explaining its contingent nature in a footnote to the footnote, as some have suggested. That would amount to merely compounding the vast expense and misleading information with an after-the-fact qualification, in an attempt to excuse or minimize the mistaken disclosure in the first place. Extensive footnotes with appended qualifications would seem a suspect solution for the vast majority of users of financial statements.

We cite the many comments already submitted by surety and banking interests that substantiate these points. MCAA's members in the main are privately held firms, so surety and commercial credit users are the ones making material judgments about our member firms. The most recent census of the construction industry shows that there are fully 773,614 construction establishments in the U.S. economy, and the vast majority of them have ten or fewer employees and probably do not routinely rely on or use audited statements in their routine business operations. But, the thousands of firms above that level do rely on such statements for bank and surety credit and to compete for negotiated project awards on both public and private projects. The competitive disadvantage that the overbroad disclosures would levy against firms that provide top-flight multiemployer defined benefit pension plans, relative to their competitors that don't provide such benefits, would constitute an egregious unfairness, well beyond the intended scope of consequences that FASB has likely considered. Moreover, only a relative handful of construction firms nationwide are publicly traded companies where *investor* interests may be implicated in the rationale for the disclosure, and many of them are counted on MCAA's membership roles as well. The size of the firm or nature of the ownership does not mitigate in any way the misleading nature of the disclosures. The FASB proposed rules are not fair for any or all of these firms irrespective of size or ownership.

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Question #3. The implementation costs of ED 715 as proposed are astronomical, and even higher when weighed against their potential for useful reliance by users of financial statements. In relative terms, simply put, the costs should not be incurred. If every contributing employer in all the 53.4% of multiemployer plans in the construction industry had to request an actuarial calculation of its withdrawal liability in every plan it participates in every year, the costs to those employers (at some \$1,200 to \$2,000 per calculation, per plan) would obviously add up quickly, and the return on "reliable disclosure" would remain static at nil. Furthermore, the plans themselves most likely wouldn't be able to use plan assets to routinely provide those assessments, even assuming they had the vast staff resources that would be required to meet the demand. Again, the information is out-of-date and therefore misleading, and then the error is compounded because the liability for that amount is not incurred unless the claim is probable, as described in the string of objectively knowable events listed above.

So, if the Board were to re-deliberate on the ED 450 construction withdrawal liability contingency and clarify it in line with the majority rule for multiemployer plans, then all the withdrawal liability costs assessments in ED 715 should be extinguished. Withdrawal liability expense calculation is the big unnecessary expense in ED 715, but many of the other lesser elements of the disclosure are problematic because they have no relevance to any useful decision making, but would require time and resources to produce with no real benefit for that cost. This is an especially significant burden for large multi-craft employers in the construction industry, who participate in many plans in many areas across the country in any given year. For example, disclosures relating to who is represented on a plan's board of trustees, how the benefits are arrived at, and the employment levels in those plans are inapt for construction multiemployer plans and the cost for compiling all that extraneous detail isn't worth the effort and expense. Whatever of it may be relevant to underwriting is obtainable from publicly available documents already produced by the plan.

Question #4. The effective dates for implementation of ED 715, as proposed, should be put off at least two years for both public and privately owned companies. These are big changes for employers of any size in our industry. Furthermore, because of the competitive disparity noted by many public companies relative to the use of audited statements in the procurement process, implementation should not be staggered for different types of firms. All should carry the same added burden into the marketplace relative to each other; in fairness, however, neither type of firm should be asked to bear it all relative to other employers not equally burdened. MCAA's comments relative to the competitive balance in the industry, in all respects including procurement, bonding and financial credit, are not extraneous issues. Accounting rules can not exist in a vacuum, and should not ignore salient legal features of the entities they would govern. Collateral consequences, intended or otherwise, do and should matter. As others have already stated, social policy considerations should be considered by FASB in this process. The unfairness of the rules in the marketplace, given their failure to reflect the organic legal rules of the plans, have consequences beyond the competitive balance among businesses, but will flow down to the retirement plans themselves, threatening participation rates and eventually benefits to participants and beneficiaries.

<u>Question #5</u>. MCAA submits that a deferred effective date for some companies relative to others would merely compound the competitive imbalances that the rule interjects into the industry.

**Question #6.** Any differentiation between public and non-public companies again just puts FASB's weight on the competitive balance scale and should be avoided in the first instance altogether with re-deliberation of both withdrawal liability proposals to properly reflect the legal structure of the majority of the multiemployer plans in the country. The way to remove this unwarranted interference in the competitive balance of the industry is to require disclosure of withdrawal liability only in those instances where it is probable that it will be incurred.

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## **Concluding analysis:**

The multiemployer defined benefit pension plan infrastructure in the construction industry is a reflection of longstanding and developing legislative and regulatory policy designed to preserve and defend this valuable workforce development and employee benefits structure. Starting with ERISA in 1974, through the Supreme Court's 1978 *Connolly* decision, the consequent 1980 Multiemployer Pension Plan Amendments, and through the recent string of Congressional funding relief measures in 2006, 2008 and 2010, these plans have proven resilient and adaptive. It was only the coincidence of unprecedented stock market declines that knocked these heretofore very stable and resilient plans back on their heels in recent years. Even so, their resilience is yet again coming through.

MCAA and its partners in the Campaign for Quality Construction are eager to continue to work with FASB in creating disclosure rules that adduce real liabilities for financial statement users, but that don't otherwise unnecessarily threaten this very valuable employee benefits system that public policy has created.

Respectfully submitted,

John R. Gentille

Chief Executive Officer