ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

In the Matter of:		
PWCA & NAPWC,	**ARB CASE NOS.**	**16-019** **16-021**
COMPLAINANTS,		
v.		
SECRETARY OF LABOR,		
RESPONDENT,		
Indiana-Illinois-Iowa Foundation For Fair Contracting		

ADMINISTRATOR'S RESPONSE BRIEF

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ADMINISTRATOR'S RESPONSE BRIEF

ISSUE PRESENTED

Did the Administrator act in a manner consistent with the Davis-Bacon Act and its implementing regulations and reasonably exercise his discretion when he determined that contractors must annualize contributions to supplemental unemployment benefit plans?

STATEMENT OF THE CASE

A. Introduction

This matter is before the Administrative Review Board ("ARB" or "Board") pursuant to the Davis-Bacon Act, as amended ("DBA" or "the Act"), 40 U.S.C. 3141, *et seq.*, and its implementing regulations at 29 C.F.R. Parts 5 and 7, on the petitions for review of PWCA and NAPWC (collectively "Petitioners"). Petitioners, two entities that sponsor plans that offer a supplemental unemployment benefit ("SUB") program to participating employers, challenge the

October 22, 2015 determinations of the Administrator ("Administrator") of the Wage and Hour Division ("WHD") that the DBA requires covered contractors to annualize contributions that they make to SUB plans in order to satisfy the Act's prevailing wage requirement.

B. Statutory and Regulatory Framework

The DBA requires that each contract over $2,000.00 "to which the Federal Government or the District of Columbia is a party, for construction, alteration or repair, including painting and decorating, of public buildings and public works . . . shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics." 40 U.S.C. 3142(a). The Act authorizes the Secretary of Labor to determine the appropriate prevailing wage, 40 U.S.C. 3142(b) ("The minimum wages shall be based on the wages the Secretary of Labor determines to be prevailing . . . ."), and defines the term "minimum wage" to include both a "basic hourly rate of pay" component and a "bona fide fringe benefits" component. 40 U.S.C. 3141(2). The Act further identifies "unemployment benefits" as a fringe benefit a contractor may provide to satisfy part of its prevailing wage obligation. *Id.* A contractor generally may receive DBA credit for fringe benefits based on the "rate of contribution irrevocably made" to a trust or the "rate of costs . . . that may be reasonably anticipated in providing" the applicable fringe benefit to laborers and mechanics. 40 U.S.C. 3141(2)(B)(i)-(ii).[1]

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[1] The DBA (and accordingly this memorandum) uses the terms "minimum wage" and "prevailing wage" interchangeably. 40 U.S.C. 3141(2).

As the Administrator's ruling letters make clear, there is no dispute that the Act entitles contractors, including those that participate in Petitioners' plans, to take DBA credit for bona fide unemployment insurance contributions or costs in order to fulfill their prevailing wage obligation. Administrative Record ("AR"), Tabs A, E. Rather, the dispute in this case concerns whether contractors that participate in Petitioners' plans can take full DBA credit for contributions to the plans when the contractors do not make contributions on behalf of their employees when they are working on non-DBA-covered jobs and the unemployment benefit is available to employees without interruption throughout the year, regardless of whether the

Consistent with the Secretary's authority to set the minimum wage, a contractor usually may not apply all its contributions to a fringe benefit plan in a given year to meet the prevailing wage obligation when employees also work for the employer on private projects in that year. *See* U.S. Dep't of Labor, Wage & Hour Div., Field Operations Handbook ("FOH"), Ch. 15 § 15f11(b) (2010) ("Normally, contributions made to a fringe benefit plan for Government work generally may not be used to fund the plan for periods of non-government work."). Rather, the contractor typically must convert its total annual contributions to the fringe benefit plan to an hourly cash equivalent "by dividing the cost of the fringe benefit by the total number of working hours (DBRA and noncovered) to which the cost is attributable." *See* FOH § 15f12(b) (noting "[t]otal hours worked by employees must be used as a divisor to determine the rate of contribution per hour, since employees may work on DBRA and nongovernment work during the year and employers are prohibited from using contributions made for nongovernment work to discharge or offset their obligations on DBRA work (*see* FOH § 15f11(b).").

This requirement, which is referred to as "annualization," prevents the use of DBA work as the disproportionate or exclusive source of funding for benefits that are continuous in nature and compensation for all the employee's work, both DBA and private. *See* FOH § 15f12(b). *See also* FOH § 15f15(d) (requiring annualization of vacation and sick leave benefits because "both . . . are generally *annual* type fringe benefits . . . .") (emphasis added). By precluding contractors from crediting contributions attributable to work on private jobs to meet their prevailing wage obligation, the Administrator ensures mechanics and laborers receive the prevailing wage on DBA jobs. *See* 40 U.S.C. 3142(b). *See also, e.g., Indep. Roofing Contractors v. Chao*, 300 F. App'x 518, 521 (9th Cir. 2008) (annualization is appropriate because the "disproportionate

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employee becomes eligible for benefits based on loss of employment on a DBA-covered job or a non-DBA-covered job.

amount of . . . [benefit contributions being paid] out of wages earned on DBA projects" results in the "underpaying [of] employees for DBA work") (internal quotation marks and citation omitted); *Miree Constr. Corp. v. Dole,* 930 F.2d 1536, 1545 (11th Cir. 1991) (annualization ensures receipt of the prevailing wage by "prevent[ing] employers from receiving Davis-Bacon credit for fringe benefits actually paid to employees during non-Davis-Bacon work").

The Administrator requires contractors to annualize contributions made to various fringe benefit plans, including health insurance plans, apprenticeship training plans, vacation plans, sick leave plans and defined benefit pension plans. For example, if a contractor contributes $5,000.00 over the course of a year to a health insurance plan on behalf of an employee who performs one thousand hours of DBA work and one thousand hours of private sector or otherwise non-DBA work, the contractor can only take credit for $2.50 per work hour toward meeting its DBA prevailing wage obligation to that employee, *i.e.*, $5,000.00/2,000 hours = $2.50 per hour. The Administrator also requires contractors to annualize contributions to finance defined contribution pension benefits. But it makes an exception if the defined contribution benefit plan provides for immediate participation and essentially immediate vesting (100% vesting after an employee works 500 or fewer hours). *See* FOH § 15f14(f)(1).

The Administrator's use of annualization to determine DBA credit effectuates Congressional intent. The fringe benefit component of the DBA prevailing wage obligation resulted from the 1964 legislative amendments to the Act. When Congress enacted the fringe benefit component, the type of plans then prevalent, which provided the backdrop for the legislation, were collectively-bargained plans which required a uniform rate of contributions for all hours worked during the year. *See, e.g.,* H.R. Rep. No. 88-308 at 3 (1963); S. Rep. No. 88-963 at 5 (1964). In addition, there is no evidence that Congress intended to allow contractors to

disproportionately finance, or subsidize, a benefit continuously available throughout the year with contributions solely, or predominantly, made on DBA projects. The Administrator has accordingly interpreted the Act's prevailing wage requirement to permit contractors to take DBA credit only for the effective annual rate of contribution to fringe benefit plans.

C. Statement of Facts and Course of Proceedings

Petitioners sponsor SUB plans. Brief of Petitioner PWCA in Support of its Petition for Review ("Pet. Br."), p. 2; AR, Tab F, Exhibit A, 5/1/06 Memo from David Wolds to Timothy Helm & Tab F, Exhibit C, NAPWC Summary Plan Description (rev. 11-4-10) ("SPD"), p. 2. The plans permit participating contractors to make contributions on behalf of workers the contractors employ. Pet. Br., p. 2; AR, Tab F, Exhibit A, 5/1/06 Memo from David Wolds to Timothy Helm & Tab F, Exhibit C, SPD, p. 3. The plans retain in trust the contributions they receive, placing them in participant-specific accounts. Pet. Br., p. 2; AR, Tab F, Exhibit A, 5/1/06 Memo from David Wolds to Timothy Helm. Participating contractors do not make contributions to Petitioner PWCA's plan for hours worked on private projects not covered by the DBA, Pet. Br., p. 3, but Petitioners make available to participants the plans' benefits when they are working on such projects. *Id.* (participants "are entitled to access the funds *whenever* they become involuntarily unable to work due to cyclical, seasonal or similar conditions") (emphasis added). Participating contractors in NAPWC's plan can choose to make contributions on behalf of employees engaged in state or federal prevailing wage construction projects, and/or on behalf of employees engaged in private construction projects. AR, Tab F, Exhibit D, NAPWC Adoption Agreement (rev. 8-30-12). Participants in NAPWC's plan are entitled to receive plan benefits

any time "they are eligible for state unemployment benefits" and in certain other circumstances. Tab F, Exhibit C, SPD, pp. 4, 8.[2]

PWCA's plan provides benefits during "short-work period[s]." AR, Tab B, Exhibit 2, CD ROM Attachment, D5 PWCA Form 5500 2011, "Report of Independent Public Accountants," p. 5.[3] PWCA defines short-work periods as "working less than 40 hours in a week or less than 173 hours in a month." AR, Tab B, Exhibit 2, CD ROM Attachment, D7 PWCA Misc. Information, p. 3. Under PWCA's plan, "layoffs, bad weather, illness, lack of work, equipment down time or any number of reasons" can all result in short-work periods that render a participant eligible to receive benefits. *Id.* The frequency of benefit payments under the PWCA plan is at the participating contractor's discretion but "many employers arrange for . . . benefits to be paid monthly . . . [by[submit[ting] hours to [PWCA] on a monthly basis" from which PWCA's contractor "process[es] a payment . . . based on the hours of work . . . missed in th[e] month." *Id.* at 5.

NAPWC similarly makes benefits available for "partial unemployment, due to a reduction in your employer's workforce or layoff due to a reduction in hours worked." AR, Tab

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[2] As the Administrator explained in his ruling letter, *see* AR, Tab E, the Administrator has not received information from NAPWC related to whether any participating contractors have chosen to make contributions on private projects. In the absence of evidence that a contractor made contributions in connection with private projects – in other words, in circumstances where the evidence indicates that a contractor has financed a benefit continuously available throughout the year with contributions made exclusively, or disproportionately, on DBA projects – participating contractors must, as explained in the Administrator's ruling letter and *infra* at 3-5, annualize their contributions to the plans for purposes of meeting the DBA's prevailing wage requirement. In contrast, to the extent that participating contractors have made plan contributions in connection with private projects in a manner demonstrating that annualization of contributions in connection with DBA projects would not be appropriate based on the principles set forth *infra*, annualization of such contributions would not be required.

[3] The quoted language appears at page 21 of the entire Form 5500, which corresponds to page 5 of the Report of Independent Public Accountants.

F, Exhibit C, p. 8. NAPWC participants are entitled to receive SUBs "for weeks in which they qualify for state unemployment insurance benefits." *Id.* However, ineligibility for state unemployment insurance benefits does not necessarily render an NAPWC participant ineligible for plan benefits. For example, if a participant is ineligible for state unemployment insurance benefits because he does not meet the "state's eligibility waiting period for unemployment insurance benefits," he is still eligible for SUBs under NAPWC's plan. *Id.*

On September 16, 2002, the Department issued a one-page letter to Petitioner PWCA granting its participating employers an exception from annualization. AR, Tab B, Exhibit 3 (concluding that "employers participating in the [PWCA] plan may receive full credit, for Davis-Bacon purposes, for the contributions made to the plan with respect to Davis-Bacon work"). The stated rationale to grant the exception appeared in a single sentence. *Id.* ("I believe that [an annualization exception] is appropriate in the circumstances present here in light of the amendments made to the plan to ensure that almost every employee will in fact receive the full cash benefit of the contributions made on the employee's behalf."). On July 15, 2013, Indiana-Illinois-Iowa Foundation for Fair Contracting ("III FFC") filed a complaint with the Administrator requesting that the Administrator revoke PWCA's annualization exception. AR, Tab D. On July 26, 2013, WHD sent a letter to PWCA that contained a copy of III FFC's complaint and requested that PWCA provide a response thereto within thirty days. AR, Tab C. On August 23, 2013, PWCA provided a response to III FFC's complaint. AR, Tab B.

On August 9, 2007, the Department issued a one-page letter to Petitioner NAPWC granting its participating employers an exception from annualization. AR, Tab F, Exhibit B (concluding that "employers participating in the plan may receive full credit, for DBA purposes, for contributions made to the plan with respect to DBA-covered work"). The stated rationale to

grant the exception reflected the same single-sentence rationale that appeared in the letter granting PWCA an annualization exception. *Id.* ("I believe that [an annualization exception] is appropriate in light of the amendments made to the plan to ensure that almost every employee will receive the full cash benefit of the contributions made on the employee's behalf."). The letter additionally informed NAPWC that it represented the Department's position based on the plan documents effective as of June 18, 2007, that the plan had to notify the Administrator of any future amendments or revisions to the plan, and that such amendments or revisions could result in a changed determination. *Id.*

On April 13, 2010, NAPWC notified WHD that it was making amendments to its plan to conform to IRS requirements, tax court decisions and individual state law requirements related to providing SUBs. AR, Tab G, Exhibit E. On August 6, 2010, WHD issued NAPWC a letter that concluded its plan "[a]s presently constituted . . . does not comply with Davis-Bacon statutory and regulatory requirements," and that accordingly "[e]mployer contributions to the Plan would not be creditable toward an employer's prevailing wage and fringe benefit obligation under the Davis-Bacon and related Acts." AR, Tab G, Exhibit A. On October 28, 2010, NAPWC submitted additional information to WHD seeking reconsideration of the August 6, 2010 letter. AR, Tab G.

On July 15, 2013, III FFC filed a complaint with the Administrator requesting that the Administrator revoke NAPWC's annualization exception. AR, Tab D. On July 26, 2013, WHD sent a letter to NAPWC that contained a copy of III FFC's complaint and requested that NAPWC provide a response thereto within thirty days. AR, Tab C. On September 6, 2013, NAPWC provided a response to III FFC's complaint. AR, Tab F.

The Administrator issued final rulings related to III FFC's complaint to both Petitioners on October 22, 2015. AR, Tabs A, E. In the letters, the Administrator concluded that the proper test to determine whether to compel annualization of SUBs is the Department's traditional standard, which requires annualization of any benefit that is continuous in nature and constitutes compensation for all work, both DBA and private. *Id.* The Administrator rejected the standard employed in the earlier letters granting Petitioners' participating contractors an exception from annualization because that standard -- whether the plan ensures that almost every employee will receive the full cash benefit of the contributions made on the employee's behalf -- is relevant to whether a plan is bona fide, and the analysis of a plan's bona fide status precedes, and is distinct from, the annualization inquiry. *Id.* The Administrator further concluded that SUBs are continuous in nature and compensation for all work because they are available on an uninterrupted basis throughout the year, and equally available to protect against loss of private work as to protect against loss of DBA-covered work. *Id.* The Administrator accordingly compelled contractors that participate in Petitioners' plans to annualize their contributions.

On or about November 10 and November 20, 2015, PWCA and NAPWC, respectively, filed petitions for review of the Administrator's final rulings to the Board. On January 6, 2016, Petitioners, the Administrator and III FFC filed a joint motion to consolidate Petitioners' appeals and to modify the briefing schedule. The Board granted the parties' joint motion and the present briefing ensued.

STANDARD OF REVIEW

The ARB's review of final decisions related to "controversies concerning the payment of prevailing wage rates," 29 C.F.R. 7.1(b), is in the nature of an appellate proceeding. *See* 29 C.F.R. 7.1(e). The Board accordingly does "not hear [such] matters de novo except upon a

showing of extraordinary circumstances." *Id.* Rather, the Board "assess[es] the Administrator's rulings to determine whether they are consistent with the statute and regulations, and are a reasonable exercise of the discretion delegated to the Administrator to implement and enforce the Davis-Bacon Act." *In re Spencer Tile Co.,* ARB Case No. 01-052, 2001 WL 1173805, at *3 (ARB Sept. 28, 2001) (citations omitted). *See also In re Int'l Union of Bricklayers & Allied Craft Workers, Local No. 1*, ARB Case No. 11-007, 2012 WL 1568657, at *1 (ARB Apr. 27, 2012). With respect to "matters requiring the Administrator's discretion, the Board generally defers to the Administrator." *In re Associated Gen. Contractors,* ARB Case No. 13-043, 2015 WL 2172489, at *1 (ARB Apr. 30, 2015) (citation omitted).

ARGUMENT

The DBA requires covered contractors to pay laborers and mechanics performing work on covered contracts the prevailing wage as determined by the Secretary of Labor. *See* 40 U.S.C. 3142(b). The Secretary has delegated to the Administrator his authority to determine the applicable prevailing wage. *See* Secretary's Order No. 01-2014, Delegation of Authority and Assignment of Responsibilities to Administrator, Wage and Hour Division (Dec. 19, 2014), 79 Fed. Reg. 77527, 2014 WL 7275751 (Dec. 24, 2014). Compelling the annualization of SUBs is consistent with the Act and regulations and is a reasonable exercise of the Administrator's discretion because annualization ensures laborers and mechanics receive the prevailing wage on DBA-covered jobs. The Board should accordingly uphold the Administrator's final ruling letters.

I. The Board Should Uphold the Administrator's Determination that Contractors Must Annualize Contributions Made to Supplemental Unemployment Benefit Plans Because it is Consistent with the Act and a Reasonable Exercise of the Administrator's Discretion.

The DBA authorizes the Secretary of Labor to determine prevailing wages. *See* 40 U.S.C. 3142(b). Consistent with this statutory authorization and Secretary's Order No. 01-2014, the Administrator conducts wage surveys in accordance with both duly-promulgated regulations and sub-regulatory guidelines in order to produce prevailing wage determinations. *See* 29 C.F.R. 1.1 thru 1.7; *Davis-Bacon Construction Wage Determinations Manual of Operations* (1986); *see also Prevailing Wage Resource Book* ("PWRB"), Section 5 (May 2015), available at http://www.dol.gov/whd/recovery/pwrb/toc.htm. Payment to laborers and mechanics of at least the wages the Administrator publishes in the prevailing wage determinations ensures laborers and mechanics on DBA-covered contracts receive no less than the minimum wage required by the Act.

Pursuant to the Secretary's authority to determine prevailing wages and consistent with the prevailing wage determinations the Administrator issues, the Administrator has long required contractors to annualize fringe benefit contributions that finance benefits that are continuous in nature and compensation for all of a laborer or mechanic's work, DBA and private. *See In re Tom Mistick & Sons, Inc.*, WAB Case Nos. 88-25, 88-26, 1991 WL 494696, at *6 (WAB May 30, 1991) (finding this proposition, made in the Administrator's brief, "eminently reasonable" because "such a disproportionate funding practice would result in the employee receiving less than the required prevailing wage rate on Davis-Bacon projects");[4] *see also Indep. Roofing*

[4] As discussed below, *Tom Mistick & Sons, Inc. v. Reich*, 54 F.3d 900 (D.C. Cir. 1995) reversed the holding of *In re Mistick* on the specific annualization issue in that case. However, the Circuit court did not question DOL's "rationale" for annualizing; it merely concluded the rationale did not "apply" under *Mistick*'s particular circumstances. *Id.* at 905 n.4.

Contractors, 300 F. App'x at 521 (noting DOL's "long history of applying annualization," including when an "employer provides a year-long benefit" so as to "ensure 'that a disproportionate amount of that fringe benefit is not paid out of wages earned on . . . Davis-Bacon work'") (citation omitted); *Miree,* 930 F.2d at 1546 (adopting the Administrator's contention that "[i]f an employer chooses to provide a year-long fringe benefit, rather than cash or some other fringe benefit, the annualization principle simply ensures that a disproportionate amount of that benefit is not paid for out of wages earned on Davis-Bacon work"); *Cody-Zeigler v. Adm'r*, ARB Case Nos. 01-014, 01-015, 2003 WL 23114278, at *13 (ARB Dec. 19, 2003) (same); *In re Rembrant, Inc.*, WAB Case No. 89-16, 1991 WL 494712, at *1 (WAB Apr. 30, 1991) (noting WHD Deputy Administrator's position that "fringe benefit contributions creditable for Davis-Bacon purposes may not be used to fund a fringe benefit plan for periods of non-government work"); U.S. Dep't of Labor, Wage and Hour Div., Opinion Letter WH-459, 1978 WL 51381, at *1 (May 17, 1978) ("We would also like to note that it is the long standing positon of the Department that fringe benefit contributions creditable for Davis-Bacon purposes may not be used to fund a fringe benefit plan for periods of nongovernment work."); *PWRB*, Section 9, p. 21 (noting that the Administrator originally applied annualization to health insurance plans in the 1970s).[5] This requirement fulfills the Administrator's obligation to ensure laborers and

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[5] WHD published edits to the *PWRB* in May 2015. Petitioners are correct that among the edits made to the *PWRB* was the addition of a sentence explaining that annualization prevents using Davis-Bacon work as the disproportionate or exclusive source of funding for "benefits that are continuous in nature and compensation for all the employee's work (*e.g.*, for a benefit that is in effect during both Davis-Bacon covered and non-covered work)." Pet. Br., p. 20 (*quoting PWRB*, Section 9, p. 22). However, the Administrator did not rely on the statement's appearance in the 2015 *PWRB* edits to support its use as a standard in the ruling letters. Rather, the ruling letters relied on the Administrator's longstanding position, as reflected in *In re Mistick, Miree* and *Independent Roofing Contractors*, that it is proper to annualize benefits that are continuous in nature and constitute compensation for all an employee's work. *See* AR, Tab A, p. 2 (citing

mechanics receive the prevailing wage because it precludes contractors from using contributions attributable to work on private jobs to meet their prevailing wage obligation on DBA-covered jobs. *See U.S. v. Binghamton Constr. Co.*, 347 U.S. 171, 177 (1954) (noting that the DBA was "not enacted to benefit contractors, but rather to protect their employees from substandard earnings" and that "Congress sought to accomplish this result by directing the Secretary of Labor to determine, on the basis of prevailing rates in the locality, the appropriate minimum wages for each project").

For instance, suppose a contractor provides two weeks of paid annual sick leave, which a worker can take at any time throughout the year. To finance the sick leave benefit, the contractor participates in a sick leave plan to which it may contribute up to two weeks of pay annually to a worker-specific account from which the participant can collect when he experiences plan-qualifying sickness. The contractor makes the entire contribution of two weeks of pay on a single DBA-covered job on which it employs the worker for 500 hours. The contractor employs the worker on private construction projects for an additional 1580 hours during the year. Because the sick leave benefit is continuously available to the worker throughout the year and compensates the worker for all his work, both DBA-covered and private, the Administrator compels annualization of the benefit to preclude the contractor from crediting contributions attributable to work on private jobs to meet its prevailing wage obligation on the DBA-covered job.

The same principles apply here. Just as the purpose of a paid sick leave plan is to provide a benefit to address a contingency that may arise at any time, SUBs' purpose is to meet a

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Miree and FOH § 15f11(b), not the *PWRB,* to support the standard) and p. 4 ("WHD *traditionally* annualizes any fringe benefit that is continuous in nature and constitutes compensation for both private and DBA work.") (emphasis added). The edit to the *PWRB* merely reflects that longstanding position.

contingent event, *i.e.*, the involuntary loss of employment, that can occur at any time. *Cf. Cal. Dep't of Human Res. Dev. v. Java*, 402 U.S. 121, 130 (1971) (noting that the federally assisted unemployment compensation insurance program "fulfills a need caused by lost employment . . . [that is] not the fault of the employee"). Petitioner PWCA makes the SUBs they provide available to participants without penalty on an uninterrupted basis throughout the year whenever a participant experiences involuntary unemployment. Pet. Br., p. 12 (SUBs are available "at any time when the employee is involuntarily unable to work"). Petitioner NAPWC makes the SUBs they provide available to participants without penalty on an uninterrupted basis throughout the year provided the participant also qualifies for state unemployment insurance benefits (or does not qualify for state unemployment insurance benefits for certain specific reasons). *See* AR, Tab F, Exhibit C, SPD, pp. 4, 8. In other words, the SUBs Petitioners make available to participants are continuous in nature.

Petitioners' plans also finance a benefit that is available during periods of both private and DBA-covered work. If a participant experiences an involuntary loss of employment working on a DBA-covered contract, he can access the unemployment benefits Petitioners provide; if a participant is performing work in the private sector when he experiences an involuntary loss of employment, he can also access the unemployment benefits Petitioners provide. Pet. Br., p. 3 (participants are "entitled to access the funds whenever they become involuntarily unable to work due to cyclical, seasonal or similar conditions"); AR, Tab F, Exhibit C, p. 8 ("You are entitled to receive [SUBs] for weeks in which you qualify for state unemployment insurance benefits, including benefits for partial unemployment, due to a reduction in your employer's workforce or layoff due to a reduction in hours worked."). As the SUBs Petitioners provide are equally available to protect against loss of private work as they are to protect against loss of

DBA-covered work, Petitioners' SUBs compensate an employee for all service performed in a given year.

Because the SUBs Petitioners make available are continuous in nature and compensation for all of a laborer or mechanic's work, compelling annualization of participating contractors' contributions to Petitioners' plans ensures such contractors do not credit contributions attributable to private work to meet their prevailing wage obligation. Compelling annualization here is accordingly consistent with the DBA's requirements that the Secretary determine the prevailing wage, and that contractors pay laborers and mechanics no less than the prevailing wage. Compelling annualization here is additionally a reasonable exercise of the Administrator's discretion because it effectuates a long-held WHD policy that both this Board and federal courts have approved in similar circumstances. *See supra*, pp. 11-12.

For these reasons, the Board should uphold the Administrator's determination that contractors must annualize contributions made to SUB plans, including those which Petitioners sponsor.

II. The Administrator's Determination is Consistent with *Mistick* Because There is No Evidence Petitioners' Participating Contractors Contribute to SUB Plans for Periods of Private Work.

The Administrator's ruling is consistent with *Tom Mistick & Sons, Inc. v. Reich*, 54 F.3d 900 (D.C. Cir. 1995). There, the Department argued, as here, that annualization "'prevents [an employer from] using the Davis-Bacon work as the disproportionate or exclusive source of funding for benefits that are in fact continuous in nature and compensation for all the employee's work, both Davis-Bacon and private.'" *Id.* at 905 n.4 (*quoting* Brief for Appellee, Sec'y of Labor, at 17 (No. 93-5376) (D.C. Cir. filed Dec. 19, 1994)). The *Mistick* court did not question the reasonableness of this "rationale for annualizing an employer's contributions"; rather, the

Mistick court concluded the rationale for annualization "did not apply" because the Department had not "established . . . that the fringe benefits used by Mistick's employees during periods of private work were financed primarily by Davis-Bacon contributions." *Id.*

The court required the Department to show that Davis-Bacon contributions financed the fringe benefits used by participants during periods of private work in *Mistick* because the Department acknowledged that Mistick "made separate contributions to a non-Davis-Bacon plan for its employees' private work." 54 F.3d at 905. *See also Indep. Roofing Contractors*, 300 F. App'x at 522 (noting that "[i]n *Mistick*, the court found that annualization was not required because Mistick contributed to a fringe benefit plan for employees' DBA work and to a non-DBA plan for employees' private work"); *Chesterfield Associates v. N.Y. State Dep't of Labor,* 4 N.Y.3d 597, 604 (N.Y. 2005) (rejecting contractor's reliance on *Mistick* to avoid annualization under New York law because "the contractor in *Mistick* . . . [unlike Chesterfield] maintained and made contributions to two separate fringe benefit plans – the Davis-Bacon plan for public work only and another fringe benefit plan for private work only"). Here, there is no evidence that Petitioners' participating contractors submit contributions to a distinct plan to finance SUBs that participants may use during periods of private work. Therefore, the rationale for annualizing contractors' contributions to Petitioners' plans applies.

Indeed, the existence of a separate fringe benefit plan for employees' private work was crucial to the *Mistick* court's decision. The *Mistick* court noted that the Department had "acknowledged at oral argument that Mistick made separate contributions to a non-Davis-Bacon plan for its employees' private work." 54 F.3d at 905. It concluded Mistick's FBP was bona fide because the Department had not established, and the court was not willing to assume, "that Mistick's contributions to the FBP for Davis-Bacon work either reduced its contributions to its

separate fringe benefit plan for private work or lowered the level of fringe benefits provided to employees for private work." *Id.* The *Mistick* court then rejected annualization for the same reason, concluding that the "Administrator ha[d] not shown that Mistick's contributions to its FBP for Davis-Bacon work financed benefits which were used by employees during private work periods and *which would have been funded by a separate fringe benefit plan for private work but for the FBP*." *Id.* (emphasis added). Thus, the *Mistick* court rejected annualization because there was another *existing* fringe benefit plan for employees' private work, and because the Administrator had not shown "that the fringe benefits used by Mistick's employees during periods of private work were financed primarily by Davis-Bacon contributions." *Id.* at n.4. In contrast, where there is no separate plan for private work -- and where, as here, benefits provided exclusively or disproportionately through contributions on DBA work may be used continuously throughout the year -- annualization of the SUB plan contributions is required. *Id.* at 905 & n.4 (recognizing that annualization is warranted when a fringe benefit used during periods of private work is financed primarily by Davis-Bacon contributions).

Similarly, contrary to Petitioners' contention, *Mistick* does not require the Administrator to prove that Petitioners' participating contractors do not provide SUBs to their employees under separate plans on private work. *See* Pet. Br., p. 16 n.6. In *Mistick*, the Administrator investigated a particular contractor to determine whether it was properly taking credit for plan contributions under the Act. *Mistick*, 54 F.3d at 902. The Administrator therefore had the power to inspect Mistick's records, including any records it possessed related to the plan it offered to employees during periods of private work. *See* 29 C.F.R. 5.6(b) (the Administrator has broad authority in investigations to compel contractors to "cooperate with any authorized representative of the Department of Labor *in the inspection of records*, in interviews with

workers, and *in all other aspects of the investigation.*") (emphasis added). In this case, by contrast, there is no enforcement-related investigation that authorizes the inspection of records. The issue instead is whether Petitioners' SUB plans are entitled to a blanket exception from annualization with respect to all plan contributions when their plans facially permit contractors to provide a year-round SUB without making contributions during periods of private work. In this posture, where the Administrator has no direct access to the (presumably) hundreds of contractors that participate in Petitioners' plans, there is no basis for compelling the Administrator to prove that each of Petitioners' participating contractors does not provide SUBs to their employees under separate plans for periods of private work.

III. Petitioners' Arguments Lack Merit and the Board Should Not Adopt Them.

Petitioners make numerous arguments in favor of reversal of the Administrator's ruling letters.[6] None demonstrate the ruling letters are inconsistent with the DBA or an unreasonable exercise of the Administrator's discretion. Petitioners' arguments accordingly lack merit and the Board should reject them.

Petitioners wrongly assert that the Administrator granted participating contractors an exception from annualization "*because* the Plan provides for immediate vesting and participation by employees and irrevocable contributions by employers." Pet. Br., p. 1 (emphasis added). Neither PWCA's September 16, 2002 letter nor NAPWC's August 9, 2007 letter granting exceptions from annualization even refers to immediate participation and immediate vesting. *See* AR, Tab B, Exhibit C; Tab F, Exhibit B. Rather, the letters state that the Administrator is

[6] NAPWC's Brief in Support of its Petition for Review "incorporates in full the legal arguments and authorities set forth in the PWCA brief as its own." The Administrator has accordingly treated his responses to PWCA's arguments as equally responsive to NAPWC.

granting an annualization exception because the plans will ensure that nearly every employee will receive the full value of the contributions made on their behalf. *Id.*

In so doing, the letters effectively focused on whether the amounts contributed to the SUB plans bore a reasonable relationship to the actual contributions required to provide the benefit. The Administrator generally employs "reasonable relationship" analysis to determine if a plan is "bona fide" under section 3141(2)(B) of the Act. *See Rembrant*, 1991 WL 494712, at *4 (agreeing with the Administrator that a fringe benefit plan was not bona fide "because contributions to the plan were greater than the actual cost of providing fringe benefits to the Davis-Bacon employees"). *See also Mistick*, 54 F.3d at 904 (finding Administrator failed to sustain burden to show there was no reasonable relationship where there was a "one-to-one ratio between employer contributions on behalf of an employee and value received by the employee"). However, the determination of whether a plan is bona fide precedes, and is distinct from, the Administrator's determination of whether annualizing a benefit is necessary. For example, the Administrator might initially conclude that the cost an employer incurs when it pays an employee's entire health care premium during a period of DBA employment bears a reasonable relationship to the benefit provided – year-long health insurance. Even assuming this is true, the Administrator will subsequently compel annualization because the health care benefit is continuous in nature and is actually compensation for all services provided in the year, including private work.

Thus, use of the standard the Administrator employed in PWCA's September 16, 2002 letter and NAPWC's August 9, 2007 letter is inconsistent with the Administrator's traditional annualization standard. The Administrator's traditional standard guarantees that laborers and mechanics receive the prevailing wage; application of the standard in the 2002 and 2007 letters

can result in contractors receiving DBA credit for fringe benefit contributions attributable to work on private jobs. Compelling contractors to annualize SUB contributions accordingly fulfills, rather than "diverges from,"[7] the purposes of the DBA. *See Binghamton*, 347 U.S. at 177 (noting that DBA "not enacted to benefit contractors, but rather to protect their employees from substandard earnings").

Petitioners' assertion that their plans share all the "features" of defined contribution pension plans ("DCPPs") that the Administrator relies on to grant certain DCPPs an exception from annualization is erroneous. Pet. Br., p. 5. The Administrator excepts certain DCPPs from annualization, in part, because DCPPs, unlike the fringe benefits which the Administrator requires contractors to annualize, are not continuous in nature. DCPP benefits are not continuous because they are typically only available without penalty after a participant reaches a certain qualifying age. *See, e.g., Uscinski v. Comm'r,* T.C. Memo. 2005-124, 2005 WL 1231826, at *1-2 (U.S. Tax Ct. 2005) (withdrawal from a 401(k) before age fifty-nine and a half constitutes taxable income and is subject to an additional ten percent tax penalty); *In re Mistick*, 1991 WL 494696, at *7 ("a pension plan by its very nature involves deferred compensation for retirement," and hence is of "a fundamentally different nature" than a year-round benefit). Conversely, Petitioners' SUBs are, like health insurance benefits, sick leave benefits and vacation benefits --

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[7] *See* Brief of Amicus United Steelworkers in Support of its Petition for Review ("USW Br."), p. 1. The Administrator appreciates that USW members may -- faced with contractors that due to economic self-interest may only contribute to a SUB plan that is not subject to annualization -- prefer SUBs that result in their receipt of less than the DBA-required minimum wage rather than receipt of the full minimum wage (without access to SUBs). However, it is allowance of such an arrangement, which effectively waives receipt of the prevailing wage, that would diverge from the Act's requirements. *See, e.g., IBEW, Local 357 v. Brock*, 68 F.3d 1194, 1202 (9th Cir. 1995) (ruling that a "voluntary" transfer by workers of a portion of the prevailing wage is impermissible because "Congress fashioned a scheme that reflected the policy determination that an enforced minimum wage on government projects was in the best interest of employees and contractors [and] . . . [t]here is no indication that the protections the Act affords are waivable . . . .").

all of which the Administrator requires contractors to annualize -- available to participants without penalty throughout the year.

That the non-continuous nature of DCPP benefits constitutes a contributing basis for granting them an annualization exception is not a "novel proposition." Pet. Br., p. 13. As described *supra*, the Administrator's longstanding position is that annualization is necessary when fringe benefit contributions finance benefits that are continuous in nature and compensation for all of a laborer or mechanic's work. *See supra,* pp., 11-12; *see also Indep. Roofing Contractors*, 300 F. App'x at 521 (concluding that the ARB had a reasonable basis for requiring annualization of apprentice training program benefits where "apprentice training continued year-round but [the contractor] contributed to the [apprenticeship training fund] only for DBA projects"). DCPP benefits, unlike the fringe benefits that the Administrator requires contractors to annualize, are not continuous in nature because they are generally not available without penalty until a participant reaches a qualifying age.

Petitioners' suggestion that a fringe benefit is not continuous in nature if a condition precedent is necessary to obtain the benefit reflects a misunderstanding of what it means for a benefit to be "continuous in nature." Pet. Br., p. 11. A benefit is continuous in nature when it is available to a participant without penalty throughout the year. That a participant might have to satisfy a condition precedent to obtain the benefit does not alter its continuous status. For example, a benefit from a sick leave plan may only be available when a participant satisfies the plan's definition of sickness or illness, and a benefit from a vacation plan may only be available if a participant takes qualifying vacation days. In both cases, WHD compels contractors to annualize contributions to such plans because the plan benefits, like the SUBs Petitioners provide, are available to a participant at any time throughout the year without penalty. *See* FOH

§ 15f15(d) ("Since both sick leave and vacation are generally annual type fringe benefits, the total hours worked during the year (government and nongovernment) should be used as the divisor" to determine the amount of credit a contractor can take from sick leave and vacation contributions to satisfy its DBA prevailing wage obligation).[8]

Indeed, the general condition precedent to access both sick leave benefits and vacation benefits -- not working -- is the same general contingency a participant must show to access SUBs. Provided participants can access the sick leave and vacation benefits throughout the year (including when they work on private projects), the Administrator compels contractors to annualize contributions to sick leave and vacation plans because the benefits are available without penalty during periods of private work and constitute compensation for all work, both DBA and private. In other words, sick leave benefits and vacation benefits provided by contractors based exclusively or disproportionately on contributions made during periods of DBA-covered work are subject to annualization, even though they are only available when a participant is not working, because they underwrite a fringe benefit available for use by a worker during periods of private work. It is accordingly incorrect for Petitioners to assert that their plans

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[8] Petitioners contend the "Administrator's ruling . . . errs in concluding that a SUB is 'similar to health insurance benefits, which WHD has long annualized.'" Pet. Br., p. 12. Petitioners' quote excludes that portion of the full sentence that identifies the material similarity; the full quote reads:

> *That a SUB is continuously available and compensates a participant for all her work* renders it similar to health insurance benefits, which WHD has long annualized.

PWCA Ruling Letter, p. 5 (emphasis added). For the reasons described herein, the benefits Petitioners make available are continuous in nature and compensate participants for all their work. Thus, the Administrator's conclusion regarding the pertinent similarity between health insurance benefits and SUBs is sound.

never "underwrite fringe benefits used by an employee during a period of private work [because] . . . access to their . . . benefits is contingent on their not working at all." Pet. Br., p. 10.

Petitioners' assertion that the benefits they offer are not continuous in nature because "money is not 'continuously' paid into an employee's account when the employee is not working" and "the benefits are not paid continuously to any employee when they are in fact working" also misunderstands what it means for a benefit to be continuous in nature. Pet. Br., p. 13. The continuous nature of a fringe benefit refers to its availability to the participant. Thus, whether a contractor makes contributions into a participant's account when the participant is not working is immaterial to the determination whether a benefit is continuous in nature.

That a participant is not entitled to receive SUBs from Petitioners when the participant is working is likewise immaterial to the determination whether a benefit is continuous in nature. As discussed above, a fringe benefit's continuous nature is not affected by the fact that a condition precedent must be met before the participant can receive the benefit. Rather, so long as the benefit is available without penalty throughout the year when the participant meets the condition precedent, the benefit is continuous in nature. A participant that *is* working simply fails to meet the condition precedent necessary to entitle the participant to receive Petitioners' benefits, just as a participant who is working would not be entitled to sick or vacation leave. In no way does that undercut the benefits' continuous nature, particularly when a participant may receive SUBs throughout the year, including during a short week caused by an illness, equipment shutdown or another reason.[9]

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[9] Both Petitioners and USW suggest the benefits Petitioners' plans provide are "seasonal" in nature. Pet. Br., p. 18; USW Br., p. 1. However, benefits under Petitioners' plans are available on a vastly broader basis than seasonally. PWCA participants can access benefits *any time* they work less than 40 hours in a week or less than 173 hours in a month. ("The SUB Plan can pay you when you have a short-work period, which is defined as working less than 40 hours in a

Petitioners' reliance on the findings in *Mistick* that there was a "'one-for-one ratio between employer contributions on behalf of an employee and value received'" and that "'[e]ach employee received the full value of each dollar contributed by Mistick, either as an enumerated benefit purchased with [Plan] funds or in cash at the end of his employment,'" is misplaced. Pet. Br., p. 15 (*quoting Mistick*, 54 F.3d at 904). The *Mistick* court relied on the "one-to-one ratio" between contributions made and benefits received in testing whether the amount contributed bore a "reasonable relationship" to the actual contributions required to provide the benefit. *Mistick*, 54 F.3d at 904. As discussed *supra*, the Administrator's reasonable relationship analysis under the Act, which the Administrator uses to test whether a plan is bona fide, precedes, and is distinct from, its analysis of whether annualization is appropriate. Thus, Petitioners' participants' receipt of the full cash benefit available under Petitioners' plans would not render annualization inappropriate under *Mistick*; it would merely demonstrate the plan is bona fide under the DBA pursuant to *Mistick*.

The *Mistick* court did conclude that it would "*dis*advantage employees" to find (as the Administrator had found) that Mistick's FBP was not bona fide because it permitted participants to use benefits during periods of private work. 54 F.3d at 905 (emphasis in original). However, that conclusion does not support Petitioners' contention that annualization is not proper here. A finding that a plan is not bona fide forecloses contractors from receiving *any* DBA credit for

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week or less than 173 hours in a month."). NAPWC participants can access benefits *any time* they are eligible for state unemployment benefits, including periods of "partial unemployment," and when they are ineligible for such benefits because, for example, they do not meet the "state's eligibility waiting period for unemployment insurance benefits." Given the myriad circumstances under which employees may receive SUB plan benefits, including for short-term absences from work due to equipment stoppages and other temporary conditions, the proper comparator here is a typical sick leave plan, which, like Petitioners' plans, makes benefits available to participants *any time* they experience a specified type of involuntary interruption of employment.

contributions to the plan. The *Mistick* court reasoned that foreclosing contractors from receiving *any* DBA credit for contributions to Mistick's FBP plan would disadvantage workers because it would require Mistick, in order to receive DBA credit, to amend the plan to permit access to benefits only during periods of DBA work. *Id.* In contrast, the Administrator's ruling letters permit participants to have full access to benefits during periods of private work. *See* Tabs A, p. 1; Tab E, p. 1. The ruling letters merely limit *the extent to which* participating contractors can take credit for contributions to a plan that allows access to benefits during periods of private work, when such contractors disproportionately or exclusively make contributions to the plan when the participants are working DBA-covered jobs. *Id.* Therefore, *Mistick*'s discussion of the "disadvantage" that would befall employees if the Mistick FBP plan was not deemed bona fide is not pertinent to the annualization issue in this case. *See* Pet. Br., p. 18; USW Br., p. 10.

Furthermore, the manner in which DBA-covered contractors provide fringe benefits belies Petitioners' contention that the Administrator's ruling letters effectively deprive laborers and mechanics of access to SUBs (because contractors will opt to provide DCPP benefits rather than SUBs). Pet. Br., pp. 16-18. For example, the DBA permits covered contractors to take DBA credit for contributions to plans that provide vacation and sick benefits. *See* 40 U.S.C. 3141(2)(B). The DBA does not require contractors that participate in such plans to make contributions on behalf of employee participants at a fixed rate, "annual cost" or "set premium." Pet. Br., p. 17. Assuming *arguendo* that Petitioners' participating contractors truly have "no way of knowing how much time [participating] employees will spend working on private projects," *id.*, contractors providing vacation and sick benefits would find it equally challenging to predict how much time their employees might work on private projects, and, based on Petitioners' reasoning, opt to provide DCPP benefits rather than vacation or sick benefits. However, DBA-

covered contractors make contributions to vacation and sick plans to satisfy part of their DBA minimum wage obligation. *See, e.g., In re Heavy Constructors Ass'n,* WAB Case No. 94-13, 1994 WL 764108 (WAB Oct. 11, 1994) (approving use of contributions to a vacation plan as a fringe benefit contribution). Petitioners' speculative contention that the Administrator's ruling letters effectively deprive laborers and mechanics of access to SUBs is accordingly unsound.

Petitioners also contend annualization of contributions to their plans would be "unworkable" and would "impose[] unacceptable uncertainties and risks" on participating contractors. Pet. Br., p. 8. To the extent it might be challenging for some participating contractors to annualize the contributions they make to Petitioners' plans, this results from Petitioners' choice to adopt plans with virtually no contribution standards (in that contractors are permitted in their sole discretion to contribute to the plan any amount in excess of the hourly wage rate on the applicable wage determination, or to make no contributions in connection with any particular project or hour of work). *See* Pet. Br., p. 17. Indeed, the uncertainty and risk that Petitioners assert participating contractors will encounter if compelled to annualize contributions to the plans would occur primarily, if not exclusively, because the plans lack any requirements regarding the rate or frequency of contributions (as long as contributions do not reduce the applicable hourly wage rate). *Id.* While the DBA generally permits entities to administer fringe benefit plans as they wish, provided the plan is bona fide and otherwise complies with DOL's implementing regulations, *see, e.g.,* 29 C.F.R. 5.29(b), it does not permit Petitioners to use extremely elastic contribution standards as a shield against compliance with DBA obligations such as annualization. Petitioners (and their participating contractors) are subject to the legal consequences of their voluntary choice to administer their plans in a manner that gives

contractors such vast discretion over whether, and in what amount, to contribute to the SUB plans.[10]

Assuming *arguendo* that application of annualization to Petitioners' plans would present genuine challenges to determining how much credit contractors may take toward meeting the DBA prevailing wage obligation, there are steps Petitioners could take, if they so chose, to alleviate such challenges. For example, Petitioners could permit, or require, participating contractors to make fixed-rate contributions for all hours worked by participants. Participating contractors that elected this option, or were subjected to it by the terms of the plan, would know precisely what portion of their contributions they could take as DBA credit.

Petitioners could also require fixed-rate contributions solely on DBA-covered work. Contractors should generally be able to approximate the number of hours they anticipate to employ workers on DBA-covered jobs because contractors will typically have made such estimates in conjunction with preparing their bids. *See Univs. Research Ass'n v. Coutu,* 450 U.S. 754, 776 (1981) (noting Congress amended the DBA to compel a predetermination of wage rates "'so that the contractor may definitely know in advance of submitting his bid what his approximate labor costs will be'") *quoting* S. Rep. No. 74-1155, at 2 (1935); H.R. Rep. No. 74-1756, at 2 (1935). Thus, a fixed-rate contribution obligation would facilitate a reasonable estimate of the amount of contributions a participating contractor is likely to make on behalf of participants on the DBA-covered project. Participating contractors should additionally be able to make a reasonable estimate of how many total hours they expect to employ a participant in a

[10] Moreover, "uncertainty" alone provides no justification for an exception from annualization. Contractors rarely know with certainty how many hours their employees will work in a given year, much less what the split between private and DBA work will be. However, such uncertainly is not an impediment to annualization, since annualization may be based on estimates of hours worked based on data from a prior quarter or year. *See* FOH § 15f12(c).

given year, based on past employment practices and other available information. *See* FOH § 15f12(c). With these two estimates, a contractor could make a reasonable estimate of how much DBA credit it could take for the contributions it makes to Petitioners.

Petitioners could also make the SUBs available solely based on involuntary loss of DBA-covered employment. As discussed above, Petitioners' plans generally permit participants to access SUBs whenever they experience an involuntary loss of employment, including when they lose work in the private sector. It is, in part, the continuous availability of the SUBs that renders them subject to annualization. If participants could only access the SUBs Petitioners make available when the involuntary loss of unemployment is regular work on a DBA-covered project, then the benefits would not be continuously available and the annualization concerns reflected in the Administrator's ruling letters would not be present.

IV. The Administrator's Ruling Letters Comport with the Administrative Procedure Act.

Contrary to Petitioners' suggestion, neither *Motor Vehicle Manufacturers Association of United States, Inc. v. State Farm Mutual Automobile Insurance Co*, 463 U.S. 29 (1983), nor *Perez v. Mortgage Bankers Association*, 135 S. Ct. 1199 (2015), supports the contention that the ruling letters run afoul of the Administrative Procedure Act ("APA"). As Petitioners' quotation of *State Farm* indicates, that case involved rescission of an existing (National Highway Traffic Safety Administration) regulation. Pet. Br., p. 18 ("[A]n agency changing its course by *rescinding a rule* is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance") (emphasis added). *Mortgage Bankers* involved whether an agency must conduct notice-and-comment rulemaking when it makes an interpretation of an existing regulation that was different than an earlier interpretation of the regulation. *See* 135 S. Ct. at 1203 (holding an agency does not have to engage in notice-

and-comment rulemaking under such circumstances). Here, the Administrator is neither rescinding a regulation nor altering the Department's interpretation of a regulation. Rather, the Administrator is interpreting a statute, the DBA, to require that contractors must annualize SUB contributions in order to comply with the Act's prevailing wage obligation. That the Administrator's interpretation of the statutory requirement to pay the minimum wage, as applied to contributions to Petitioners' plans, differs from the interpretation the Administrator made on this question previously is immaterial to review of the Administrator's action under the APA because that statute "makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

In any event, the Administrator's ruling letters provided a reasoned analysis for his interpretation of the DBA to compel contractors to annualize SUB contributions, and the Administrator's reasoned analysis satisfies the Board's standard to explain a departure from a previous conclusion. *See In re Miami Elevator Co.*, ARB Case Nos. 98-086, 97-145, 2000 WL 562698, at *13 (ARB Apr. 25, 2000) (noting that because the Administrator is "in the best position to interpret those rules in the first instance . . . , absent an interpretation that is unreasonable in some sense or that exhibits an *unexplained departure* from past determinations, the Board is reluctant to set the Administrator's interpretation aside") (emphasis added). The Administrator first explained that WHD has traditionally required annualization of benefits that are continuous in nature and constitute compensation for both private and DBA work. AR, Tabs A, E. The Administrator then observed that WHD had employed a different test in granting annualization exceptions to SUB plans, *i.e.*, whether nearly all employees will receive the full cash benefit of the contributions submitted on their behalf, without addressing whether SUB

benefits are continuous in nature and actually constitute compensation for private work. *Id.* Next, the Administrator noted that the test the Department had previously used appeared to focus on whether the benefit amounts contributed by contractors to SUB plans bore a reasonable relationship to the actual contributions required to provide the benefit. *Id.* Finally, the Administrator explained that the Department employs "reasonable relationship" analysis to determine if a plan is bona fide, and that the determination of a plan's bona fide status precedes, and is distinct from, the determination of whether annualization is necessary. *Id.*

The Administrator accordingly concluded, consistent with the Department's historic test for determining whether a contractor must annualize specific fringe benefit contributions and the Act itself, that it would not be appropriate to provide an annualization exception to a contractor's contributions to a SUB plan if the benefit is continuous in nature and constitutes compensation for both private and DBA work. AR, Tabs A, E. After reaching this conclusion, the Administrator examined whether the benefits Petitioners make available are continuous in nature and constitute compensation for both private and DBA work. *Id.* And as described above, the Administrator engaged in an analysis that determined such benefits are both continuous and compensation for private and DBA work. *Id.* In sum, the Administrator provided a reasoned analysis, and "good reasons," to support its determination that SUB plan benefits like those provided by Petitioners are subject to annualization. *Fox Television Stations, Inc.*, 556 U.S. at 515 (while an agency may not "depart from a prior policy *sub silentio* . . . it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates").

CONCLUSION

The Petitioners have failed to establish that the Administrator unreasonably exercised his discretion or acted contrary to the Act or its implementing regulations by compelling participating contractors to annualize contributions they make to Petitioners' plans. On the contrary, the Administrator's rulings were consistent with his authority under the Act to determine the prevailing wage because requiring the annualization of SUBs, by preventing the disproportionate or exclusive funding of a benefit that is continuous in nature and compensation for both DBA and private work, ensures laborers and mechanics receive the prevailing wage. The Board should accordingly find that the Administrator acted within his discretion and dismiss Petitioners' petitions for review.

Respectfully submitted,

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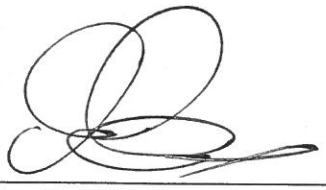

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CERTIFICATE OF SERVICE

This is to certify that on this 1st day of April, 2016, copies of the foregoing ADMINISTRATOR'S RESPONSE BRIEF were sent via first class mail to:

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