U.S. DEPARTMENT OF LABOR
Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

PWCA, **ARB CASE NO. 16-019**

COMPLAINANT,

v.

SECRETARY OF LABOR,

RESPONDENT,

Indiana, Illinois, Iowa Foundation for Fair Contracting (III FFC)

Re: Supplemental Unemployment Benefit Provided under PWCA Welfare Benefit Plan.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

III FFC'S PETITION TO INTERVENE AS AN INTERESTED PARTY

The Indiana, Illinois, Iowa Foundation for Fair Contracting ("III FFC") submits this petition to intervene as an interested party pursuant to the Davis-Bacon Act, 40 U.S.C.A. § 3141-3148 and 29 C.F.R. Part 7, and in support of states as follows:

The III FFC is a not-for-profit labor-management cooperation committee organized pursuant to Section 302(c)(9) of the Labor Management Relations Act. 29 U.S.C. § 186(c)(9). One of the III FFC's primary activities is to monitor public works projects for compliance with

laws impacting the construction industry, including federal and state prevailing wage compliance, proper classification of employees versus independent contractors, and workplace safety issues. In furtherance of this activity, the III FFC files complaints with state and federal agencies, including complaints concerning the Davis-Bacon and Related Acts with the U.S. Department of Labor ("Department").

The III FFC is an interested party because it initiated the Department's review of the supplemental unemployment insurance plan in this proceeding. In correspondence dated July 15, 2013, the III FFC submitted a request that the Department revoke the annualization exemption of three supplemental unemployment benefit plans, including the PWCA (formerly Prevailing Wage Contractors Association, Inc.) Welfare Benefit Plan (the "SUB Plan") (Exhibit A). In correspondence dated July 26, 2013, the Department contacted the SUB Plan requesting a position statement and report (Exhibit B). In correspondence dated October 22, 2015, the Department stated that contributions to the SUB Plan are generally subject to annualization and that contributions to PWCA are subject to annualization (*see* Attachment 1 of PWCA's Petition for Review dated November 10, 2015). The Department's October 22, 2015 determination is the subject of the SUB Plan's appeal to the Administrative Review Board.

The III FFC is comprised, in part, of construction industry employers performing work covered under the Davis-Bacon and Related Acts (DBRA). Accordingly, the III FFC represents contractor interests as they pertain to Davis-Bacon compliance. The III FFC's concern is that represented contractors remain competitive when bidding construction projects subject to the DBRA.

The nature of the III FFC's presentation will include a discussion supporting the Secretary of Labor's position that SUB plans that are continuous in nature and compensate employees for both private and public work, such plans must be annualized. Stated differently, employers should not be permitted use fringe benefit contributions on DBRA work as the disproportionate or exclusive source of funding for a benefit that is continuous in nature and is compensation for both private and DBRA work. To find otherwise places employers that annualize fringe benefit contributions, such as employers represented by the III FFC, at a competitive disadvantage on DBRA construction projects.

The III FFC will also discuss its position that the SUB Plan should not be exempted from the annualization requirement because it does not operate similarly enough to immediately-vesting defined contribution plans, which are commonly exempted. The concern is that employee-participants may not receive all amounts contributed to the plan for work performed on DBRA projects, for example, forfeiture upon a participant's voluntary termination and not returning within two years to a participating employer, or if the SUB Plan is unable to locate participates to issue payment. This result undermines the annualization principle, which is to ensure workers are paid prevailing wage rates on DBRA projects.

For the reasons set forth above, the III FFC requests the Board grant its petition to intervene in support of the Secretary of Labor.

Date: December 29, 2015

Respectfully submitted,

Indiana, Illinois, Iowa Foundation for Fair Contracting

By: ______________________

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Exhibit A

Marc R. Poulos
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"keeping it fair, for contractors and workers"

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July 15, 2013

Via Email: Helm.Timothy@dol.gov
Timothy Helm
Chief of Government Contracts Branch
Wage and Hour Division
U.S. Department of Labor
200 Constitution Ave., NW
Room S-3006
Washington, DC 20210

Re: Revocation of annualization exemption for certain SUB plans

Dear Mr. Helm,

I am writing on behalf of the Indiana, Illinois, Iowa Foundation for Fair Contracting (III FFC) concerning the exemption of three Supplemental Unemployment Benefit (SUB) plans from the Department's Davis-Bacon annualization rule,[1] namely the National Association of Prevailing Wage Contractors (NAPWC), Prevailing Wage Contractors Association (PWCA), and National Association of Prevailing Wage Employers (NAWPE) plans.

It is the opinion of the III FFC that these SUB plans should not qualify for an annualization exemption because they do not operate similarly enough to immediately-vesting defined contribution pension plans, which are commonly exempted. Benefits under these plans are never fully vested; they depend on work schedules and lay off periods and rehiring within a certain pool of contractors, all of which could leave some individuals with no benefits for work performed on Davis-Bacon projects.

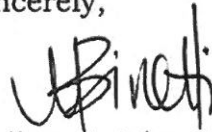
[1] The III FFC previously contacted the Department in July and October 2012 with concerns pertaining to the Builders and Contractors Supplemental Unemployment Insurance Plan, and encouraged the Department to deny that plan's request for an annualization exemption.

Additional concerns with the three SUB plans further support revocation. First, the plans provide "short week" payments that appear to be beyond the scope of SUB payments approved by the IRS. Second, it appears that the plans do not pay all required payroll taxes. Third, the III FFC encourages the Department to review related-parties transactions to ensure the plans meet reporting and disclosure requirements to determine whether fee payments to related parties are reasonable (i.e. based on services actually provided as opposed to what an agreement states). A more complete description of these concerns is attached.

Finally, we encourage the Department to send any revocation letter to all participating contractors to ensure compliance. A participant list for two of the three SUB plans is attached.

Accordingly, the III FFC asks the Department to review its decision to grant these three exemptions and strongly consider revocation. The III FFC further encourages the Department to eliminate the annualization exemption, requiring all SUB plans to comply with the annualization principle.

Sincerely,



Melissa L. Binetti
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Annualization exemption concerns

A. Annualization principle

As explained in a May 3, 2002 memo issued by the Department:

> *The annualization principle encourages traditional fringe benefit plans, which provide meaningful and continuous benefits to employees. It discourages plans which are often likely to provide benefits of limited duration and amount. It is obvious that plans under which an employer contributes funds only during Davis-Bacon work, where funding is precariously dependent upon the contractor's obtaining work subject to the Davis-Bacon provisions, are primarily for the benefit of the employer.*

As discussed in the 2002 memo, the Department determined an exception to the annualization rule was appropriate for contributions to defined contribution pension plans which provide for immediate participation and immediate or essentially immediate full vesting. Similar exemptions have been made for SUB plans on a case-by-case basis.

It is the opinion of the III FFC that SUB plans that contribute to employee accounts only on Davis-Bacon projects, instead of on all hours worked, should not be exempted from the annualization requirement because they do not operate similarly enough to immediately-vesting defined contribution plans.

Contractors satisfy Davis-Bacon requirements by paying the required amount in cash wages, making contributions to a bona fide fringe benefit program, or any combination thereof. In the three SUB plans discussed herein, employees would receive higher cash wages on their checks for hours worked on Davis-Bacon projects but for the SUB plans. Instead, Davis-Bacon rates owed above the employees typical pay is contributed to the SUB plan, administrative fees are deducted and, in theory, the employee is eligible to receive benefits based on the account balance upon "separation" from employment. As discussed below the three SUB plans have a much broader definition of "separation" than contemplated by the IRS. And there appears to be no guarantee that an employee will receive all amounts contributed to the plan.

Ultimately, the concern is whether approving an annualization exemption for SUB plans is in the best interest of workers. For example, the Notes to the Financial Statement in the PWCA's 2010 Form 550 (amended) state that the plan held stale checks for participants who could not be located in amounts over $87,000 for the year ending in 2010 and over $67,000 for the year ending in 2009.

It is clear that contractors benefit from the exemption, as it appears they do not withhold FICA taxes on these contributions (see Section C), and do not have to annualize the rates over hours worked on public and private projects. *If* payroll taxes are withheld, the burden of paying appears to be exclusively on the employee. And plan administrators benefit from significant percentages of fees paid from contributions received.

Because these plans appear to be primarily for the benefit of employers, the III FFC encourages the Department to end its approval of SUB plans that do not comply with the annualization principle.

B. "Short Week" Payments

It appears that all three plans provide "short week" payments, in which workers are paid benefits if they work less than 40 hours a week, or less than 173 hours a month, even for events such as bad weather.

NAPWC: National Association of Prevailing Wage Contractors

Participants are eligible for benefits if the employee *"worked less than 173 straight-time hours in the previous month"* with benefit payments based on the number of *"under-worked hours"* (2011 Form 5500 audit, Appendix D1).

PWCA: Prevailing Wage Contractors Association

"The Plan provides for weekly and short-work period supplemental unemployment benefits" (2011 Form 5500 audit, Appendix D5). *"The SUB Plan can pay you when you have a short week period, defined as working less than 40 hours in a week or less than 173 hours in a month."* (Material sent in 2012 to the Missouri Division of Labor Standards, Appendix D7).

NAWPE: National Association of Prevailing Wage Employers

The summary plan description refers to payment only in the event of "involuntary separation from employment," including temporary separation (NAPWC Form 1024, Appendix D9). However, the NAPWC website explains that the plan *"provides cash benefits to employees during breaks in service, downtime, or seasonal layoffs"* (Appendix D11). The fund provides *"an alternative paycheck"* if there is a *"work shortage"* or *"bad weather" for* increments of at least 8 hours of missed work in a week. (Member contractor memo to workers, Appendix D11).

The III FFC is not aware of any IRS determination or policy that permits short week payments under these circumstances. SUB plan benefits are typically contemplated for involuntary separation from employment, or an equivalent partial separation (discussed in section B.1, below), not a slow week or bad weather. This apparent misuse of "short week" payments by the SUB plans is a key reason the annualization exemptions should be revoked.

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1. Background on SUB plans and short week payments

The first SUB plans were created in 1955 in the automobile industry. During the next few years, similar plans were created in the aluminum, glass, rubber, and steel industries. These plans provided weekly benefits to bridge the gap between state unemployment benefits and the pay received while working, a gap that existed because state unemployment benefits typically amounted to only 50% of working wages.[2]

These industries in which SUB plans arose suffered from high levels of both seasonal and cyclical unemployment. Seasonal unemployment existed due to factory shut downs for such things as annual maintenance or transitions to new models. Cyclical unemployment occurred when product demand slackened and manufacturing employers responded by using lay-offs to decrease production. The relevant manufacturing unions pushed for SUB plans to ensure more stable wages for their members, and in these early plans union leaders and business executives served as joint trustees.

Payments under these initial SUB plans were limited to two types. The first was weekly payments made only after the participant had filed for and been awarded state unemployment benefits. Some plans also provide lump-sum severance payments, either after a permanent lay-off or after state unemployment benefits had run out. In 1960, the IRS created a special non-profit category for SUB plans, the designation 501(c)17, and in 1968 adopted the first regulations concerning this new exempt category.

Part 7, Chapter 25, Section 17 of the Internal Revenue Manual (IRM) describes the typical SUB plan as set up by a separate trust and "funded by payments by the employer to the trusts of a certain amount per hour per employee" (IRM 7.25.17.1.1, Appendix B1).

As outlined in the Internal Revenue Manual the types of allowable SUB plan payments have expanded over the years. Permissible benefits include relocation payments, union dues payments, and short week payments, as well as subordinated sickness and accident benefits (IRM 7.25.17.3.2, Appendix B1). However, the conditions under which these benefit types are to be paid are proscribed in the relevant IRS regulations.

The IRS broadened SUB plan payment options to include "short week" payments in Rev. Rul. 1970-189 (Appendix C3). The ruling described an employer faced with lessened personnel needs. According to text of the ruling:

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[2] On SUB plan origins, see the IRS Manual, Part 7, Chapter 25, Section 17; Alfred M. Skolnik, "Trends in Employee Benefit Plans: Part II," Social Security Bulletin (May 1961); and the 3/2/56 opinion letter by the Washington State Attorney General concerning a UAW SUB plan (Appendix B).

... rather than reduce the number of its employees, it [the company] *reduced the hours that each employee worked each week. Each employee thus suffered a loss in pay, but no employee suffered a loss of his job.*

The employer had written to the IRS for permission to use funds in an existing SUB plan to pay the lost wages for the employees who had their work weeks shortened, and thus suffered a decrease in pay. The IRS approved the short week payments, ruling the employment situation of these workers "had has been changed in a way equivalent to partial separation." Accordingly, the IRS ruled that these types of short week payments "will be treated as 'supplemental unemployment compensation benefits' within the meaning of section 501(c)(17) of the Code."

In addition, the Social Security Program Operations Manual Systems on SUB plans (POMS, Sec. RS 01402.450, Appendix C1) defines short week payments as limited to:

*... compensation for loss of pay due to shorter work weeks **to avoid** involuntary separation* (emphasis added).

A comparison with the original IRS ruling on supplemental unemployment benefit (Rev. Rul. 1956-249, Appendix C2) is informative. Initially, payments were made only to laid off employees. And even being laid off was not sufficient:

To be eligible for a benefit, a former employee must report to and register for employment with the State Employment Service.... He is ineligible to receive supplemental unemployment benefits from the fund if he is ineligible to receive or is disqualified from receiving State unemployment compensation benefits.

Rev. Rul. 1956-249 outlined only three other "limited situations" in which supplemental unemployment benefits may be made:

1. When a laid-off person had insufficient wage credits under state law,
2. When a laid-off person had exhausted the weekly unemployment payments allowed by the state, or
3. During a qualified waiting period for unemployment benefits when the period was over "v weeks." (The ruling did not identify the number of weeks which would allow payments, as they varied by state).

The ruling added that even in these three cases, benefits were payable "only if he would otherwise have been eligible for state unemployment compensation."

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2. The "short week" benefits paid for less than 40 hours by the three SUB plans may not be a permissible benefit

It is not clear whether the IRS Revenue Ruling 1970-189 applies to the type of short week payments made by the three SUB plans discussed here, i.e. payments made for less than 40 hours worked in a week/less than 173 hours in a month due to an irregular work week. The IRS approval of "short week payments" appears to be under very specific circumstances; when a company opts to decrease the regularly scheduled work weeks for its employees as an alternative to lay-offs.

This is not the case in the construction industry, where irregular work weeks are common due to weather, early job completions, and scheduling problems. Indeed, a worker with 35 hours one week might have worked 45 hours in both preceding and subsequent weeks. Work weeks in construction are not uniform; accordingly a short week in construction does not result from a system to avoid lay-offs and thus does not result in the "partial separation" described in Revenue Ruling 1970-189.

Finally, one wonders how the plans prevent contractors from using short week payments to provide paid time off for such things as sick days, holiday pay, or vacation leave, costs which must all annualized under Davis-Bacon fringe benefit rules. Indeed, a review of filings by the PWCA plan discloses just this problem. The auditor states the plan accepted $1.5 million in contributions in 2010 alone for vacation and holiday pay for *"non-eligible participants."* The auditor also disclosed that in 2010 and 2011, a group of employers *"routinely requested distributions from the Plan based solely on the participants' account balances and not necessarily on hours missed"* (Appendix D5).

C. Failure to meet FICA Obligations

All three plans assert FICA taxes are not due on the SUB benefits. However, a series of IRS rulings shows that that SUB payments *"must be tied to state unemployment compensation"* to qualify for a FICA exemption (Rev. Ruling 1990-72, Appendix C5; PLR-129867-02, Appendix C6). SUB benefits, paid in a lump-sum, or not directly related to state unemployment compensation, are considered wages with FICA payroll taxes due, an IRS position supported by the courts regarding short week payments. *See CSX Corp. v. U.S.* (discussed below). While it is not known how much of each benefit type was paid by each plan, the conditions under which these short week payments may be made would frequently occur for many construction workers.

The Social Security Administration's Program Policy Information website contains the public version of the agency's Program Operations Manual System (POMS). Section RS 01402.450 of the manual provides the agency's current

guidance on payroll taxes and supplemental unemployment benefits (Appendix C1). The section notes that while SUB plans may provide a variety of benefit types, only one type of SUB plan benefit is exempt from federal payroll taxes.

> *To qualify as a wage exclusion, SUB payments must be tied to State unemployment compensation, which are periodic payments.... SUB payments paid in a lump-sum* ***or*** *not directly related to State unemployment compensation are wages* (emphasis added).

This section of the POMS was created from previous IRS Revenue Rulings on supplemental unemployment benefits and taxes, the first of which was Rev. Rul. 1956-249 (Appendix C2). This initial 1956 ruling concluded that "under certain circumstance" benefits paid to individuals under a supplemental unemployment benefit trust do not constitute "wages" for purposes of the Federal Insurance Contributions Act.

IRS Revenue Ruling 1977-347 expanded the wage exemption to another form of supplemental unemployment benefit plans: lump sum severance payments to terminated employees (Appendix C4).

> *Since the supplemental unemployment plan in Rev. Rul. 56-249 and the plan in the instant case are substantially the same, the fact that benefits under the plan are not tied to the State's unemployment benefits is not a material or controlling factor. The payments under both plans are supplemental unemployment compensation benefits as defined in section 3402(o) of the Code.*

However, IRS Revenue Ruling 1990-72 reversed this ruling and stated that supplemental unemployment benefits "must be linked to the receipt of state unemployment compensation and must not be received in a lump sum in order to be excluded from the definition of wages" (Appendix C5). The relevant section of the ruling, which uses the term dismissal pay for severance pay, reads:

> *The portion of Rev. Rul. 77-347 concluding that benefits do not have to be linked to state unemployment compensation in order to be excluded from the definition of wages for FICA and FUTA tax purposes is inconsistent with the underlying premises for the exclusion and is therefore hereby revoked. This action restores the distinction between SUB pay and dismissal pay by reestablishing the link between SUB pay and state unemployment compensation set forth in Rev. Rul. 56-249.*

Based on this ruling, to be excludable from the definition of "wages" for purposes of FICA and FUTA taxes, an employee receiving SUB pay must meet the requirements necessary to receive state unemployment compensation benefits.

Section RS 01402.450 of the Social Security Administration's Program Operations Manual System included, among the various types of allowed SUB payments, the phrase "compensation for loss of pay due to shorter work weeks to avoid involuntary separation" (Appendix C1). However, the manual did not directly discuss whether such payments qualified for the wage exclusion, beyond the general statement that any SUB payments "not directly related to State unemployment compensation are wages."

There is at least one IRS guidance letter that addresses the question of payroll taxes and short week SUB plan payments (PLR-129867-02, released 5/30/2003, Appendix C6). The letter described a SUB plan that provided three types of payments: (1) regular benefits; (2) automatic short week benefits; and (3) separation payments. Consistent with IRS Revenue Ruling 1990-72, this guidance letter ruled that the separation payments, which were made only in a lump sum, constituted wages for the purposes of FICA. Consistent with IRS Revenue Ruling 1990-72 and Revenue Ruling 1956-249, the letter ruled that the regular benefits were not wages for the purposes of FICA, because they were tied to the receipt of state unemployment compensation.

Regarding short week payments, the IRS guidance letter described the benefits as paid to plan participants who worked less than a full week, limited only to employees with at least one year of service. The letter then applied IRS Revenue Ruling 1990-72 and found that the only short week payments excluded from the definition of wages were for those weeks which "immediately precede or follow" a week in which an employee received regular benefits, which were benefits tied to state unemployment compensation. "All other short week payments are wages for FICA and FUTA purposes" (Appendix C6, pg. 7).

This IRS guidance letter, like others, stated the ruling was directed only to the taxpayer requesting it and thus "may not be used or cited as precedent." However, the courts have looked to the IRS revenue rulings for guidance in determining whether SUB payments are subject to FICA. For example, the 2008 decision in *CSX v. United States* looked to Rev. Ruling 56-249 and Rev. Rul. 90-72 in determining that various supplemental unemployment benefit payments were "wages" and subject to FICA. 581 F.3d 1328, 1339-40 (C.A.Fed.2008). *See also* Associated Electric Cooperative, Inc. v. U.S., 42 Fed. Cl. 867, 874 (Fed. Cl. 1999) (discussing Rev. Rul. 56-249 and Rev. Rul. 90-72 as excluding SUB pay from the definition of "wages" where it is linked to the receipt of state unemployment compensation).[3]

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[3] The III FFC notes that there is a question of whether severance pay due to involuntary termination, but not tied to receipt of state unemployment, is exempt from FICA taxes. The IRS's petition for review in *In re Quality Stores, Inc.*, is currently pending before the Supreme Court of the United States. 693 F.3d 605 (6th Cir. 2012). However, the *Quality Stores* facts involve permanent loss of employment, not short week payments.

As summarized below, it appears that each of the following plans treat SUB payments as excluded from wages for FICA purposes. This appears to be the case even when overpayments are made based on account balances and not necessarily hours missed (See PWCA Form 5500, Appendix 5D). Because the payments are not necessarily tied to separation from employment, or the equivalent of separation due to a reduction in hours, nor are they tied to eligibility for state unemployment benefits, it is the opinion of the III FFC that the plans are not in compliance with IRS regulations and the Department should revoke the annualization exemption.

NAPWC: National Association of Prevailing Wage Contractors

The annual IRS nonprofit reports filed for the last three years contain a required line item disclosure for payrolls taxes; in each year no such tax payments were reported. The last three annual benefit plan reports make only one mention of the issue, in an auditor's note on contingencies (Appendix D1). The auditor notes *"the Trustees are evaluating the appropriate payroll tax and withholding requirements on the payments to its participants. No liability has been recorded related to this issue."*

PWCA: Prevailing Wage Contractors Association

A plan brochure states that contractors are allowed *"a complete write off for fringe dollars – no payrolls taxes"* while another section states *"SUB payments are not subject to Social Security and Medicare taxes."* The website states *"Our members are able to keep fringe rate dollars by buying non-taxable benefits instead of incurring taxable payroll"* while another section states *"benefit payments are not subject to Social Security or Medicare taxes."*

NAWPE: National Association of Prevailing Wage Employers

A plan brochure states *"these cash benefits are exempt from employee FICA"* while the website states the benefit are paid while *"saving all payroll taxes;"* and later as *"free from all payroll taxes"* (Appendix D11). Benefit checks issued by American Contractors Trust (the VEBA providing benefits to members of the NAWPE) also show payments with only two deductions, one that appears to be for income taxes and one for a check cashing fee. Finally, while a 1996 SPD states that *"required payroll tax withholding, if any, will be withheld from your benefits and paid over to the proper taxing authorities,* the annual IRS nonprofit reports filed in 2011 by the five largest trusts disclose that none reported paying any payrolls taxes in the line item for that disclosure.

D. Additional Concerns

While it is permissible for funds to have related party transactions, entities are required to comply with various reporting and disclosure requirements concerning these relationships. The III FFC encourages the Department to take steps to ensure that each entity is in compliance with such requirements

NAPWC: National Association of Prevailing Wage Contractors

The annual benefit plan reports disclose party-in-interest transactions, but not the relationship type. The largest amount, $703,905 in 2011, was paid as broker fees to a for-profit insurance entity. The 2010 report disclosed the plan had an agreement to pay related parties 16% of total contributions. Whether the fees are reasonable and necessary depends on the services actually performed, as opposed to what a written agreement provides.

In addition, NAPWC's Audit report filed with its 2009 Form 5500 refers to a pending audit by the U.S. DOL's Employee Benefit Security Administration, initiated in January 2010 (page 5 of Notes to Financial Statement, Appendix D1). The 2010 Form 5500 also refers to this audit and notes that "no findings or conclusions have been reached by DOL."

PWCA: Prevailing Wage Contractors Association

Annual benefit plan reports from 2005 to 2010 denied making any related party transactions. However, an amended 2010 filing (which had a new auditor) disclosed payments of $904,959 to a service provider owned by the PWCA executive director. The new 2010 audit also stated the auditor was unable to determine the condition of the financial statements because *"the Plan has not maintained sufficient accounting records and supporting documents relating to benefit distributions, contributions, and participant balances"* (Appendix D5). Again, whether the transactions were reasonable depends on the services provided and compliance with applicable reporting and disclosure requirements.

The 2011 benefit plan report, filed under a new EIN (45-1144616), included information on additional plan problems.

- In 2010 and 2011, a group of employers *"routinely requested distributions from the Plan based solely on the participants' account balances and not necessarily on hours missed."* The auditor estimated these benefit overpayments were $257,000 and $260,000 but added *"this estimate may be adjusted as more information becomes available and any adjustment could be significant."* (page 8 of Notes to Financial Statement, Appendix D5).

- The U.S. DOL began a "routine examination" of the plan in 2012 (page 12 of Notes to Financial Statement, Appendix D5).

NAPWE: National Association of Prevailing Wage Employers

The National Association of Prevailing Wage Employees (NAPWE) sponsors 15 separate voluntary employee benefit associations (VEBAs) to provide supplemental unemployment benefits to the employees of member construction contractors. However, it appears that the numerous NAPWE SUB plans have never filed annual benefit plan reports, an apparent violation of U.S. DOL filing requirements. *

The plans have filed IRS annual reports and applications to become a non-profit (Appendix D9). These documents state that the two men who founded the NAPWE, Edward Cogswell Jr. and Edward Cogswell III, signed contracts on behalf of the association to pay at least 10% of annual contributions to for-profit entities they control. According to minutes of the initial NAPWE meeting, Cogswell Benefits was hired as the marketing agent for trust activities. The agreement stated Cogswell Benefits would receive 10 percent of gross contributions, which Cogswell would continue to receive for any contractors it signed up if the marketing contract was terminated for any reason other than good cause. The same NAPWE meeting also hired Northwest Administrators as the plan administrator. The agreement with Northwest Administrators did not disclose the amount, instead referring to a monthly administration charge "as set forth in the plan fee disclosure form." Whether the fees are reasonable depends on the actual services provided and compliance with applicable reporting and disclosure statements.

E. Participating Contractors

If the U.S. DOL revokes the annualization exemption for the three SUB plans, there is no guarantee the plan sponsors will inform the participating contractors in a timely fashion. The U.S. DOL should require that notice to contractors and require proof of such mailing be provided. However, we also encourage the Department to send a copy of the revocation letter to all known participating contractors, along with a cover letter explain the ramifications of that ruling as it pertains to the contractor's prevailing wage fringe benefit calculations.

* See the 2004 report of the ERISA Advisory Council Working Group on Health and Welfare Form 5500 Requirements, http://www.dol.gov/ebsa/publications/AC_112204_report.html.

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NAWPE: National Association of Prevailing Wage Employers

An electronic database of annual benefit plan filings maintained by a for-profit vender named Larkspur Data (http://www.larkspurdata.com) allows a search by plan name, with the results downloadable to a spreadsheet format. A search conducted in early 2013 found 61 of users of the American Contractor Trust plans. The results, including the name and address and EIN number of the participating contractors is provided in an Excel file in the CD-ROM appendix of this report (Appendix E1).

NAPWC: National Association of Prevailing Wage Contractors

The 2011 annual IRS report filed by the NAPWC SUB plan includes a list of 102 participating contractors, including the names, address, and EIN number, while the 2010 report included 99 participating contractors. Copies of the filings are provided in pdf form in the CD-ROM appendix of this report (Appendix E2).

PWCA: Prevailing Wage Contractors Association

Neither the benefit annual reports nor the nonprofit annual reports provide a list of participating contractors, nor do companies appear to file their own benefit reports, beyond a small number of contractors.

APPENDIX
(CD-Rom Documents)

A U.S. DOL Annualization Exemptions

1. 2001 U.S. DOL annualization exemption letter to NAWPE
2. 2002 U.S. DOL annualization exemption letter to PWCA
3. 2007 U.S. DOL annualization exemption letter to NAPWC

B Short Week Payments

1. Internal Revenue Service Manual, Part 7, Chapter 25, Section 17
2. IRS Revenue Ruling 1956-249 and IRS Revenue Ruling 1970-189
3. Social Security Administration's Program Operations Manual System (POMS), Section RS 01402.450
4. Alfred M. Skolnik, "Trends in Employee Benefit Plans: Part II," Social Security Bulletin (May 1961)
5. March 2, 1956 opinion letter by the Washington State Attorney General concerning the Ford Motor/UAW and General Motors/UAW SUB plans

C FICA Obligations

1. Social Security Administration's Program Operations Manual System (POMS), Section RS 01402.450
2. IRS Revenue Ruling 1956-249
3. IRS Revenue Ruling 1970-189
4. IRS Revenue Ruling 1977-347
5. IRS Revenue Ruling 1990-72
6. IRS PLR 129867, Number 200322012, release date 5/30/2003

D Plan Documents

1. NAPWC Form 5500 reports
2. NAPWC SUB Trust Form 990 reports
3. NAPWC Inc. Form 990 reports
4. NAPWC misc. information
5. PWCA Form 5500 reports
6. PWCA Form 990 reports
7. PWCA misc. information
8. SCA Form 5500 reports
9. NAPWE/ACT IRS Application
10. NAPWE/ACT Form 990 reports
11. NAPWE misc. information

E Participating Contractors

1. NAPWE/ACT SUB plan users
2. NAPWC SUB plan users

Exhibit B

U.S. Department of Labor

Wage and Hour Division
Washington, D.C. 20210

JUL 2 6 2013

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San Diego, CA 92121

Dear Messrs. Cogswell, Profitt and Wolds:

This is in reference to a request for a review our office has received from the Indiana-Illinois-Iowa Foundation for Fair Contracting (III FFC) regarding the requirement that contributions made by employers on behalf of employees working on construction contracts subject to the Davis-Bacon Act to fringe benefit plans be "annualized," and the exception to this requirement for the Supplemental Unemployment Benefit (SUB) plans of the National Association of Prevailing Wage Contractors (NAPWC), the Prevailing Wage Contractors Association (PWCA) and National Association of Prevailing Wage Employers (NAPWE).

A copy of the III FFC request for review is enclosed, as is a CD-ROM of documents also submitted by III FFC in support of its request. The name of the file on the CD is oepgc. The password is subplans1$.

Please review this matter and advise us of the position of the SUB plan that you represent regarding the contention of III FFC that the exception from the annualization requirement is not appropriate. Please provide us with a report, including any relevant supporting documents, within 30 days.

Sincerely,

Timothy J. Helm
Chief, Branch of Government Contracts Enforcement
Office of Enforcement Policy

Enclosures
cc: w/o enclosure:
III FFC

ADMINISTRATIVE REVIEW BOARD

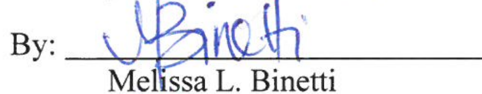
CERTIFICATE OF SERVICE

CASE NAME: ***PWCA v. Secretary of Labor, et al.***

ARB CASE NO: **16-019**

The undersigned certifies that on December 29, 2015, a copy of foregoing *III FFC's Petition to Intervene as an Interested Party* was sent to the following persons via certified mail.

Indiana, Illinois, Iowa Foundation for Fair Contracting

By: 
Melissa L. Binetti

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