INDUSTRY IMPROVEMENT FUND OPERATIONS GUIDE

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Industry Improvement Fund
Operations Guide

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CHAPTER I – INTRODUCTION

PREFACE

Industry Improvement Funds have been the economic engine that has promoted and supported the growth of the Mechanical Contracting Industry over the last fifty years. Properly organized and operated, they have proved to be an equitable, orderly and economical method of promoting our industry for the benefit of all mechanical contractors. Industry Improvement Funds (hereafter sometimes referred to as "IIF") are established by mechanical contractors and their trade associations. In virtually all cases, they are organized as state law trusts or non-profit corporations exempt from federal income taxation as a business league under Internal Revenue Code §501(c)(6). Funding is, in most cases, through local collective bargaining agreements, so the costs of programs are distributed equitably amongst all employers who are signatories to those agreements. Through broad-based funding, Industry Improvement Funds make it possible to sponsor programs for the benefit of the mechanical contracting industry at costs that are a small fraction of the cost that would be incurred by individual firms and those costs are shared equitably by all who benefit from them.

This Operations Guide has been prepared by the law firm of Lindabury, McCormick, Estabrook & Cooper, P.C., Westfield, New Jersey, and the Industry Improvement Fund Committee of the Mechanical Contractors Association of America, Inc., as a reference source for the mechanical construction industry. It offers suggestions and guidelines for the organization and administration of Industry Improvement Funds. It also provides programming suggestions and addresses and answers a number of your frequently asked questions.

The Industry Improvement Fund Operations Guide is not to be used as a substitute for legal advice, since questions always arise in specific circumstances. Due to the complexities of federal and state laws and regulations, it is strongly recommended that you consult with an attorney who is familiar with industry improvement funds when specific issues arise.

HISTORY OF INDUSTRY IMPROVEMENT FUNDS

The legality of Industry Improvement Funds has been well settled for over fifty years. In 1958, the U.S. District Court for the Eastern District of Pennsylvania held that the Industry Improvement Fund operated by the Mechanical Contractors Association of Philadelphia had a lawful objective and purpose, with the ability to enforce employer contributions. In addition to establishing that "the administration and control of said Industry Improvement Fund solely by representatives of management is lawful," the Court clarified that "the joint administration and control of said industry improvement fund by representatives of labor and management is unlawful." This is the essential legal framework. **An Industry Improvement Fund must be exclusively under the control of employers; joint administration or control with representatives of a labor organization is legally prohibited.**

That last crucial point in the development of Industry Improvement Funds is closely linked to the passage of the Labor-Management Relations Act of 1947 ("LMRA"), also known as the Taft-Hartley Act, and its subsequent amendment and judicial interpretation. In the 1940's, unions increasingly secured agreement from their counterpart contractor associations to use labor contracts to divert wages to finance employee benefit programs such as pension and welfare plans. Concerned that such contractual arrangements were leading to cases of bribery and extortion that were corrupting the collective bargaining process, Congress passed the LMRA. This legislation was aimed at preventing bribery of employee representatives by employers and to prevent union officials from possessing power that could result from sole control over employee benefit plans and funds. Arroyo v. United States, 359 U.S. 419 (1959).[1]

1 The United States Supreme Court provided the following excellent description of the Congressional purpose in enacting the LMRA and specifically Section 302, regarding payments between employers and unions:
"When Congress enacted §302 its purpose was not to assist the States in punishing criminal conduct traditionally within their jurisdiction, but to deal with problems peculiar to collective bargaining. The provision was enacted as part of a comprehensive revision of federal labor policy in the light of experience acquired during the years following passage of the Wagner Act, and was aimed at practices which Congress considered inimical to the integrity of the collective bargaining process. . . .

Those members of Congress who supported the amendment were concerned with corruption of collective bargaining through bribery of employee representatives by employers, with extortion by employee representatives, and with the possible abuse of union officers of the power which they might achieve if welfare funds were left to their sole control. Congressional attention was focused particularly upon the latter problem because of the demands which had then been recently made by a large international union for the establishment of a welfare fund to be financed by employers' contributions and administered exclusively by union officials. [citation omitted].

Congress believed that if welfare funds were established which did not define with specificity the benefits payable thereunder, a substantial danger existed that such funds might be employed to perpetuate control of union officers, for political purposes, or even for personal gain. [citations omitted]. To remove these dangers, specific standards were established to assure that welfare funds would be established only for purposes which Congress considered proper and expended only for the purposes for which they were established." [citations omitted]. Arroyo v. United States, 359 U.S. 419, 79 S.Ct. 864, 3 L.Ed. 2d 915 (1959).

The LMRA prohibits all payments and the acceptance of payments between an employer or employer association and representative or representatives of employees. A violation of LMRA is a criminal offense, punishable as a misdemeanor by a fine of not more than $10,000 or imprisonment for not more than one year, or both; and if done willfully[2], a felony punishable by a fine of not more than $15,000 or imprisonment for not more than five years, or both, (29U.S.C. §186(d)). To this broad prohibition there were originally five narrow exceptions.

LMRA Exceptions for Certain Payments between an Employer or Employer Association and Representative or Employee Representatives

Original Exceptions:

1. Compensation paid by an employer to any employee whose duties include acting openly for the employer in matters of labor relations, or personnel administration or to any representative of the employees, or to any officer or employee of a labor organization, who is also an employee or former employee of the employer, as compensation for his or her service of such employer, 302(c)(1);
2. Payments in settlement of disputes or in satisfaction of judgments and awards, 302(c)(2);
3. Payments with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business, 302(c)(3);
4. Payment of union membership dues authorized by the employee to be deducted from wages, 302(c)(4);
5. Payments made to a trust fund established for the sole and exclusive benefit of the employees of the employer and their families and dependents, 302(c)(5).

Additional Exceptions:

6. Payments made by an employer to a trust fund established for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeships or other training programs, 302(c)(6) adopted 1959;
7. Payments made by an employer to a pooled or individual trust fund established for the purpose of (a) scholarships for the benefit of employees, their families, and dependents for study at educational institutions; (b) child care centers for preschool and school age dependents of employees; or (c) financial assistance for employee housing, 302(c)(7) adopted 1969;
8. Payments by any employer to a trust fund established for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice, 302(c)(i) adopted 1973;
9. Payments by an employer to a plant, area, or industry-wide labor management committee established for one or more purposes set forth in section 5(b) of the Labor Management Cooperation Act, 302(c)(9) adopted 1978 as part of the Comprehensive Employment and Training Act of 1978.

29 U.S.C. 186(c).

2 Courts interpret "willfully" very permissively for prosecutors – as the law is means to discourage corrupt practices.

With regard to the fifth exception, relating to pension and welfare funds, the LMRA established specific requirements for those funds in order to prevent the perceived dangers to the integrity of the collective bargaining process including:

(a) A written agreement detailing the basis on which pension and welfare benefits would be paid.

(b) Equal employer and employee representation in the administration of the funds.

(c) Impartial arbitration of deadlocked disputes, and;

(d) An annual audit.

Each of the new authorized "funds", referenced as Items 6-9 above, were likewise required to comply with the prerequisite of a written agreement, equal representation, impartial arbitration and an annual audit.

Understanding that in passing the LMRA, Congress intended to separate industry influence over union operations and vice versa, courts which initially considered the permissibility of Industry Improvement Funds, consistently held that they were invalid when they were jointly administered by employers and unions. In the 1957 case of Sheet Metal Contractors v. Metal Workers Association, 248 F.2d 307 (9th Cir. 1957), for example, the court considered permissibility of the Joint Industry Board of the Sheet Metal Industry which was formed to:

(1) Administer the fund;

(2) Aid in the settlement of disputes between the union and the employer's association;

(3) Establish an apprentice program;

(4) Provide a forum for discussion of industry problems;

(5) Cooperate with the public and quasi public bodies regarding legislation and other matters of interest to the industry.

The Ninth Circuit Court of Appeals determined that under the original exceptions in the Act, such purposes were impermissible for joint union-employer administration.

Likewise, the permissibility of a similar Industry Improvement Fund was tested in 1959 when the Third Circuit Court of Appeals analyzed it under the Act in Mechanical Contractors Association of Philadelphia v. Local 420, 265 F.2d 607 (3rd Cir. 1959). In that case, a jointly administered fund was utilized to pay for

(1) The operating costs of the fund;
(2) Public relations;
(3) Public education in the heating, piping and air conditioning industry;
(4) Promotion of stability in labor management relations;
(5) Employer costs in collective bargaining;
(6) Mentoring facilities for arbitration and grievances;
(7) Creating and administering with labor, health and welfare funds and apprenticeship programs.

The Court held that under the LMRA, the fund was impermissible because it was jointly controlled by the union and the employers.

Similarly, in the 1962 case of Local No. 2 of the Operative Plasterers and Cement Masons International Association v. Paramount Plastering, 310 F.2d 179 (9th Cir. 1962), an Industry Improvement Fund was at issue that was created with the following purposes in mind:

(1) Promotion of industry betterment,
(2) Industry public relations,
(3) Encouragement of harmony between labor and management,
(4) Carrying out programs for the advancement of the industry, and
(5) Gathering and disseminating facts, data and information relative to the use and benefits of lathe and plaster.

Again, the Ninth Circuit Court of Appeals held that such funds did not strictly fall within the original exceptions of the Act and thus, were impermissible.

After these cases were decided, lobbying efforts by organized labor continued and legislative proposals to permit jointly administered Industry Improvement Funds were considered in 1962, 1963, 1965, 1968, 1969, 1970 and 1971. The House of Representatives passed such legislation in 1965, 1968, and 1970 but the proposed legislation never survived the United States Senate.

In 1978, a new legislative effort was commenced and the Labor-Management Cooperation Act was passed as part of the **Comprehensive Employment and Training Act of 1978**.

Specific Authorized Purposes of the Labor-Management Cooperation Act as part of the Comprehensive Employer Training Act of 1978:

1. Improving communication between representatives of labor and management;
2. Providing workers and employees with opportunities to study and explore new and innovative joint approaches to achieve organizational effectiveness;
3. Assist workers and employers in solving problems of mutual concern not susceptible to resolution within the collective bargaining process;
4. Study and explore ways of eliminating potential problems which reduce the competitiveness and inhibit the economic development of the plant area and industry;
5. Enhance the involvement of workers in making decisions that affect their working lives;
6. Expand and improve working relationships between workers and managers
7. Encourage free collective bargaining by establishing continuing mechanisms for communication between employers and the employees through federal assistance to the formation and operation of labor management committees.

The Labor-Management Cooperation Act of 1978 also amended the LMRA. One amendment authorized the Federal Mediation and Conciliation Service to "encourage and support the establishment and operation of joint labor-management activities conducted by plant-wide area and industry-wide committees designed to improve labor-management relations, job security and organizational effectiveness," in accordance with the provisions of Section 205A.

Section 205 of the LMRA was amended by adding a new Section 205A which provides, among other things as follows:

(a) Establishment and Operation of Plant Area and Industry wide Labor-Management Committees.

(1) The Service is authorized and directed to provide assistance in the establishment and operation of plant, area and industry wide labor management committees which:

(A) Have been organized jointly by employers and labor organizations representing employees in that plant, area or industry; and

(B) Are established for the purpose of improving labor management relations, job security, organizational effectiveness, enhancing economic development or involving workers in decisions affecting their jobs, including improving communication with respect to subjects of mutual interest and concern. Pub. L. 95-524, §6(c)(2); 29 U.S.C. §175(a).

Finally, Section 302(c) of the LMRA was amended by adding a new subsection, 302(c)(9), which provides as follows:

> (9) With respect to money or other things of value paid by an employer to a plant, area or industry wide labor management committee established for one or more of the purposes set forth in section 5(b) (sic.) of the Labor Management Cooperation Act of 1978. Pub. L. 95-524, §6(d); 29 U.S.C. §186(c)(9).

The reported legislative history of the 1978 amendment, however, is devoid of any express reference to Industry Improvement Funds or similar funds. Moreover, the objectives and purposes set forth in the Labor-Management Cooperation Act are not comparable with the objectives, purposes, and functions of Industry Improvement or similar funds. In addition, the Courts have consistently held that the exceptions to the Labor- Management Relations Act must be narrowly and strictly construed so as to effectuate the purposes of that statute. Moglia v. Geoghegan, 403 F.2d 110 (2nd Cir. 1968).

After the Courts defined the basic legal elements and parameters and legislative efforts for joint administration failed, the use of Industry Improvement Funds grew and expanded industrywide. **Today, Industry Improvement Funds are lawful only if their administration and control are performed solely by representatives of management.** Any joint administration and control of Industry Improvement Funds by representatives of labor and management is unlawful. Any joint labor management committee or employee benefit trust fund must be established, organized and operated strictly in accordance with and for the limited express purposes set forth in the LMRA, and no other purpose.

In the five decades since the early Court decisions, Industry Improvement Funds have become an essential part of the Mechanical Contracting Industry for purposes of educating and informing contractors and maintaining and improving industry performance standards for the benefit of all industry firms, their workforce, public, and private sector clients.

Note: All of the historical detail is meant to show that IIFs are totally different and distinct from joint labor management cooperation committees added to the law in 1978. These differences must be carefully respected in the operation of an IIF.

	Industry Improvement Funds	Joint LMCC
Form	**Trust, Non Profit Corporation**	**Trust**
Purposes	**Promote, support and educate industry employers**	**Facilitate worker and employer communication and effectiveness**
Operations	**Sole Employer control**	**Jointly Administered**
Permissible Function	**Employer education, marketing, government relations, et. al.**	**Dispute resolution, union/employer communication and work effectiveness**

CHAPTER II – ORGANIZATION

ORGANIZATIONAL STRUCTURE

Industry Improvement Funds are not a creation of federal or state statute. Rather, the foundation of an Industry Improvement Fund is the legal instrument upon which the organization is based. Industry Improvement Funds may be based upon:

(1) a common law trust or

(2) a nonprofit corporation.

The legal instruments giving rise to each of these business organizations is different.

An Industry Improvement Fund can be established through a common law trust which is created by an Agreement and Declaration of Trust.[3] A trust is simply a contractual arrangement under which a Trustee or Board of Trustees holds legal title to the property of another person, called a beneficiary, in this case the contractors who have contributed to an Industry Improvement Fund.

In creating a non-profit corporation, formal paperwork, usually called "Articles of Incorporation"[4] or a "Certificate of Incorporation" must be filed with the state Secretary of State or Secretary of Treasury, and corporate "bylaws" which lay out the operating rules for the corporation must be written.[5] Forming a corporation generally protects the owner's personal assets from creditors of the corporation.

For specific questions about Industry Improvement Fund governance, contractors and associations should rely upon the advice of competent legal counsel who is knowledgeable about state laws concerning corporations and trusts as they relate to Industry Improvement Funds.

3 For a sample trust agreement, see **Appendix 1 -- Industry Improvement Fund Agreement and Declaration of Trust**

4 For sample articles of incorporation, see **Appendix 2 -- Industry Improvement Fund Articles of Incorporation**

5 For a sample ByLaws, see **Appendix 3 -- Industry Improvement Fund ByLaws**

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PURPOSE OF INDUSTRY IMPROVEMENT FUNDS

An Industry Improvement Fund's basic purpose is not one of profit. Instead, an Industry Improvement Fund is geared to carry out the organization's purposes through program activity. Generally, an Industry Improvement Fund is utilized to protect, promote, foster, and advance the interests of employers engaged in the mechanical contracting and service industry including, but not limited to, the following pursuits:

1. To develop, stimulate, and encourage best practices in the mechanical contracting industry overall and conduct and improve labor-management relations in the mechanical contracting industry through programs and activities related to:
    a. Research
    b. Education
    c. Trade promotion activities
    d. Suitable legal action
    e. The acquisition and holding of real and personal property without limitation as to amount.
    f. Through such other means and methods as the Corporation shall deem desirable or necessary.

    The Industry Improvement Fund also has the authority to collect contributions from the employers eligible to participate in the activities of the Corporation and the expenditure of funds to carry out these purposes.
2. To engage in public relations programs designed to create a better public understanding of the industry and to encourage greater use of the industry's services by owners and construction and service purchasers for the benefit of the general public.
3. To cooperate with public officials and representatives of other organizations on all matters of mutual interest affecting the construction industry.
4. To foster and promote better employer/employee relationships and to strive for optimum efficiency and workmanship in construction methods.
5. To foster and provide for the education and training of supervisory and managerial personnel, including the improvement of contracting practices and project delivery methods.
6. To promote research and experimentation concerned with improving existing construction practices and methods and developing, testing and promoting new construction materials and/or modes of construction.

7. To promote safety in the mechanical contracting industry by developing programs and activities directed at assisting, technically or otherwise, architects, engineers, specification writers, general and specialty contractors, and governmental authorities and agencies, in the formulation or improvement of federal, state, and municipal regulations and other technical and safety programs having as their object the safe, adequate and improved quality of mechanical contractors' service to the public.
8. To support the activities and programs of the Corporation and Affiliated Trade Association including collective bargaining and related matters.
9. To foster and promote compliance with all laws, regulations, and orders concerning affirmative action and equal opportunity for employment.
10. The purposes of the Corporation shall at all times remain in compliance with 501(c)(6) of the United States Internal Revenue Code of 1986 and applicable Treasury Regulations there under as the same may be from time to time amended, supplemented or succeeded, which Code and Treasury Regulations (or corresponding provisions of any future Federal Internal Revenue Law) are hereinafter collectively referred to as the "Code".
11. To exercise all rights and powers and engage in all other acts conferred by the laws of the State of [State], and specifically as provided in [State Non-Profit Corporation Act] et. seq., on not-for-profit corporations, including but not limited to the right and power to acquire by bequest, devise, gift, purchase, lease, or otherwise any property of any sort or nature without limitation as to its amount or value, and to hold, invest, reinvest, manage, use, apply, employ, sell, expend, disburse, lease, mortgage, convey, option, donate, or otherwise dispose of such property and the income, principal, and proceeds of such property, for any of the purposes and terms set forth in the Articles of Incorporation and Bylaws.

Thus, Industry Improvement Funds are utilized for the primary purposes of education, industry promotion, communications and publications, research, industry and community relations, governmental relations, recruiting, security and job safety promotion, and the sponsorship of special events. A discussion of these major types of activities follows in Chapter V, but this does not imply that Industry Improvement Funds are limited only to these categories. **It should be stressed, however, that Industry Improvement Funds may not be used for any program which tends to restrain or limit competition.**

FORMATION ISSUES

For specific questions about Industry Improvement Fund formation and governance, contractors and associations should rely upon the advice of competent legal counsel who is knowledgeable about state laws concerning corporations and trusts as they relate to Industry Improvement Funds. With the advice of local legal counsel, the following are some issues to be considered in the formation of an Industry Improvement Fund.

After the Industry Improvement Fund has identified its purpose, it must decide upon its structure and formation. As noted, the most common organizational structures are either a common law trust or a nonprofit corporation. In forming either entity, the first consideration is whether it should have Members. Members in a nonprofit entity are akin to the stockholders of a for profit corporation, although it is typically discretionary under most state laws as to whether the nonprofit entity must have Members or not. Consideration, therefore, must be made as to whether the Industry Improvement Fund is to have Members and whether the contributing mechanical contractors should be the Members. If so, what rights and powers should they be granted? In deciding this issue, however, it has been the common practice that due to the number of contributing mechanical contractors to an Industry Improvement Fund, there usually is one sole Member, the affiliated trade association.

After identifying the Member(s) of the Industry Improvement Fund, it is necessary to determine the Board of Trustees. The Board of Trustees is responsible for the management and direction of the business and affairs of the Industry Improvement Fund, including control over all activities, contributions and reserves. The number of members of the Board of Trustees typically is in a range such as, "shall consist of no fewer than 10 and no more than 20, inclusive of ex officio trustees." Ex officio trustees are representatives that are automatically appointed as a result of their position or office with the Industry Improvement Fund. For instance, an Officer of the affiliated trade association, Executive Director of the affiliated trade association or prior Presidents of the affiliated trade association or Chairman of the Industry Improvement Fund can be ex officio members. Ex officio members can serve with or without a vote on the Board of Trustees of the Industry Improvement Fund. Members of the Board of Trustees should be appointed in staggered classes. For instance, there could be three staggered classes of three-year terms. To create the staggered terms, the initial class of Trustees would have one, two and three-year terms and each succeeding class would have three-year terms so that one-third of the Board rotates each year. The initial Board of Trustees of the Industry Improvement Fund can be appointed by the Board of

Directors of the affiliated trade association with subsequent Trustees being nominated by a nominating committee of the Board and voted on by the Board of Trustees of the Industry Improvement Fund. Consideration should be given to having term limits. For instance, a member of the Board of Trustees could serve 2 three-year terms and would have to go off the Board for at least one year before renomination.

Normally the Board of Trustees will have an annual meeting for the election of Trustees and Officers of the Industry Improvement Fund. At least one annual meeting of the Board may be required by the State Nonprofit Corporation Act. Regular meetings of the Board can be scheduled or called at such time when needed and properly noticed. The Board of Trustees can also have special meetings called by a certain number of Board members or the Chairman. A quorum is the amount of members of the Board of Trustees that is necessary to be in attendance in order for there to be effective action and to bind the Industry Improvement Fund. Typically, it should not be less than one-half of the members of the Board. Voting at the Board of Trustees meeting should be by majority of those present constituting the quorum. It is possible to require greater than majority vote on certain issues like removal of trustees or sale of the assets of the Industry Improvement Fund or amendment of the by-laws.

It is always a best practice to have written notice of any meetings of the Board of Trustees at least 10 days before the meeting but not more than 60 days in advance. Notice of a meeting can be waived in writing or by a Board member appearing at the meeting without objecting. Boards of Trustees can meet by telephone so long as all participants in the meeting can hear everyone else. Most State Nonprofit Corporation Acts also allow a Board to take effective action without meeting by all members of the Board agreeing to the proposed action by written unanimous consent.

The common Officers of an Industry Improvement Fund are a Chairman, Vice Chairman, Secretary and Treasurer, although the titles to those individuals are not important and typically not dictated by state law. The**Appendix 3 -- Industry Improvement Fund ByLaws**

will spell out their respective duties and responsibilities. Common Committees of the Board include a Nominating Committee, Finance Committee and Executive Committee. Because Committees of the Board are delegated authority and are composed of Board members, it is common

that the Committee's actions will be circumscribed so as not to take actions without the involvement of the full Board. These may include the following prohibited transactions:

1. Make, alter or appeal any by-law
2. Elect, appoint or remove any Officer or Trustee
3. Submit to the Member(s) any action requiring Member's approval
4. Make any grant or distribution of funds
5. Amend or appeal any resolution of the Board.

NEGOTIATION OF INDUSTRY IMPROVEMENT FUND

Contributions to the Industry Improvement Fund should be included in the collective bargaining agreement for the purpose of improving the industry for all participants, including industry clients, employees, and the general public, and should not be considered as related in any way to the wages or working conditions aspects of the agreement.

If an Industry Improvement Fund clause is included in a collective bargaining agreement, it is an enforceable provision of the contract and the signatories to the contract may be required by legal action to contribute to the fund as provided for in the agreement. Likewise, the union would be on sound ground if it were to refuse to furnish employees to signatories who fail to contribute to an Industry Improvement Fund established by a collective bargaining agreement.[6]

The collective bargaining agreement between employers who are represented by the local Mechanical Contractors Association and the union or between individual employers and the union can provide for contributions to your local Industry Improvement Fund. Contributions to the fund will be made by employers bound to make those payments under the collective bargaining agreement. The amount an employer contributes to the Industry Improvement Fund should be specified within the agreement.

The legal foundation for the collective bargaining process and the inclusion of the Industry Improvement Fund in your local collective bargaining agreement is the National Labor Relations Act, 29 U.S.C. §§ 151-169 ("NLRA"). Congress enacted the NLRA to establish legitimate rights of employers, employees and labor organizations and to encourage collective bargaining, and eliminate certain practices on the part of labor and management that were harmful to the general welfare. The NLRA is administered and enforced by the National Labor Relations Board (NLRB) and its General Counsel. Section 7 of the NLRA states and defines the right of employees to organize and to bargain collectively with their employers through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or

6 Industry Improvement Funds, as discussed earlier in this Operations Guide, are separate and distinct entities from so-called "joint labor-management committees" (LMCCs) or "CETA" funds. In 1978, Congress enacted the Labor Management Cooperation Act, which was part of the Comprehensive Employment and Training Act (CETA). Under the Labor Management Cooperation Act, joint labor-management committees may be established with representatives of both labor and management. These are jointly trusteed Taft-Hartley funds under Section 302 of the Labor Management Relations Act of 1947; but they are not employee benefit funds under the Employee Retirement Income Security Act of 1974 ("ERISA"). This statute, however, permits such committees to engage only in a narrowly defined range of activities, focusing primarily on improving the collective bargaining process and avoiding formal grievances or other aspects of actual collective bargaining as noted on page 9 of this Operations Guide. These committees are not program-oriented and should not be considered as substitutes for Industry Improvement Funds.

protection or not to do so. The NLRA also delineates certain practices of employers and unions as unfair labor practices.

Contributions to an Industry Improvement Fund are not mandatory subjects of bargaining. The NLRA defines mandatory subjects of bargaining to include rates of pay, wages, hours of employment, or other terms and conditions of employment. An employer and the employees' representative must bargain in good faith on such subjects, although neither party has to agree and either party may lawfully go to impasse over them. Other mandatory subjects of bargaining include but are not limited to such matters as pensions for present employees (not retirees), bonuses, group insurance, grievance procedures, safety practices, seniority, procedures for discharge, layoff, recall or discipline, and union security clauses.[7]

Matters that are lawful but are not related to wages, hours, and other conditions of employment are considered "non-mandatory" subjects of bargaining, also called "permissive" subjects of bargaining. The parties are free to bargain or not to bargain and to agree or not to agree with respect to permissive subjects of bargaining. But neither may insist on bargaining on such subjects over the objection of the other party to impasse (making an agreement on a non-mandatory subject a condition to any agreement). Neither party owes the other any explanation over its unwillingness to discuss a permissive subject of bargaining. So, for example, a union could simply decline to even discuss an IIF contribution, just as management could decline to address a proposed union dues check off.

Since contributions to an Industry Improvement Fund are permissive subjects, a union may refuse to bargain about an IIF contribution without violating its duty to bargain in good faith. Insisting on the inclusion of an Industry Improvement Fund in a collective bargaining agreement to the point of impasse is not allowed. Such action would be considered an unfair labor practice under the NLRA. Contributions should be negotiated on the basis of improving the industry for all participants and should not be bargained for as part of wages or working conditions.

Section 8(a) of the NLRA sets forth unfair labor practices by an employer and Section 8(b) sets forth unfair labor practices by a labor organization or its agents. The following cases illustrate the interplay between the concepts of permissive/mandatory subjects of bargaining and the inclusion of Industry Improvement Funds.

7 Union security clauses are mandatory subjects; union dues check off, however, is a permissive subject. Union security clause requires bargaining unit members to pay dues or fees within 8 days of employment. In non right to work states, failure to pay can result in being discharged. Union dues check-off is merely an administratively convenient way for the union to collect dues.

- ***N.L.R.B. v. Detroit Resilient Floor Decorators Local No. 2265***, 317 F. 2d 269 (6th Cir. 1963).

Facts: The union insisted to impasse that each employer agree to contribute one cent per hour for each hour each employee worked to a promotional fund.

Holding: The Board found the Fund to be a permissive subject of bargaining and the union's insistence on it was a violation of 8(b)(3) [it is an unfair labor practice for a union to refuse to bargain collectively with an employer] under the NLRA.

- ***National Labor Relations Board v. Sheet Metal Workers International Association***, 575 F.2d 394 (2nd Cir. 1978).

Facts: The NLRB sought enforcement of an order requiring the Association to desist from unfair labor practices in connection with the local union and the employer. The Board found that the local union violated section 8(b)(3) of the NLRA by its insistence on collective bargaining agreement provisions requiring the employer to contribute to two industry promotion funds.

Holding: An Industry Improvement Fund is not a mandatory subject of collective bargaining. The NLRB properly found that the union violated the NLRA by insisting on an Industry Improvement Fund provision, a non-mandatory subject of bargaining, as a precondition to reaching a collective bargaining agreement.

- ***Inland Tugs v. NLRB***, *918 F.2d 1299* (7th Cir. 1990).

Facts: A union filed several unfair labor practice charges against a group of barge lines, commercial terminal companies, and dock companies. The Board found that the barge company had violated its duty to bargain, rejecting its defense that it was relieved of bargaining when the union insisted to impasse that the company contribute to certain trust funds. The company filed a petition for review of the Board's decision.

Holding: The court explained that forcing a bargaining deadlock over inclusion of a permissive subject of bargaining—contributing to trust funds that supported industry promotion efforts—suspends the other's party bargaining duty and was an unfair labor practice. Furthermore, if a union unlawfully conditions future bargaining, the employer is free to implement unilateral changes with respect to any mandatory bargaining subjects.

Other circuits that have held that contributions to industry promotion funds are not mandatory subjects of bargaining:

- ***N.L.R.B. v. Local 264, Laborers International Union of North America***, 529 F. 2d 778, 786 (8th Cir. 1976).
- ***McDonald v. Hamilton Elec., Inc. of Florida***, 666 F.2d 509 (11th Cir. 1982).

MODEL COLLECTIVE BARGAINING AGREEMENT PROVISIONS

Concurrent with the development of the Industry Improvement Fund organizational documents, language must also be written for inclusion in the collective bargaining agreement. Typical contract language is shown in the following clause:

Industry Improvement Fund

Section 1:

The Association maintains the _____ Mechanical Contracting Industry Improvement Fund for the purpose of protecting and promoting the general welfare of the mechanical contracting industry in accordance with the Agreement and Declaration of Trust for the Industry Improvement Fund heretofore made and executed. The Employer agrees to pay and contribute to the said Industry Improvement Fund [the sum of _____ cents per hour for each hour worked] [___% of wages paid for each hour worked] by all journeymen and apprentices in the employ of the Employer.

Section 2:

Contributions to this fund shall be secured by a bond as described in Article ____.

CAUTION: In line with the earlier admonition that lawful operation of an Industry Improvement Fund excludes joint administration with the union, language in the collective bargaining agreement must not give the union any authority or control over the formation or operation of the IIF. For instance, the purposes or activities should not be limited in the collective bargaining agreement. The collective bargaining agreement should not grant the union the right to audit the Industry Improvement Fund or give it veto authority over Industry Improvement Fund activities or grant a union official ex officio status on the Board of Trustees. It would be unadvisable and legally compromising to do any of the above.

CONTRIBUTOR RIGHTS AND RESPONSIBILITIES

Contributors have no rights in the assets (cash or otherwise) of the Industry Improvement Fund. Their rights and responsibilities are confined to those enumerated in the controlling documents and in the enforcement of them as against those that are given the responsibility to carry them out, namely, the Board of Trustees.

DISSOLUTION OR MERGER OF INDUSTRY IMPROVEMENT FUNDS

In the instance where the funding source for the Industry Improvement Fund is terminated by dissolution or merger, the assets do not revert back to the contributing employers. Rather, the Industry Improvement Fund continues to fulfill its purposes until funds are exhausted. Alternatively, the assets of the Industry Improvement Fund can be transferred to an Industry Improvement Fund that is still active and viable and to which its contributing contractors may have joined. If there was an underlying merger of affiliated trade associations, the industry improvement funds can likewise be merged on a tax free basis.

CHAPTER III – FINANCING

FINANCIAL ADMINISTRATION AND OBJECTIVES

Financial administration is directly vested in the Trustees or Directors, or by delegation, if authorized, to an Executive Director. This includes taking possession of the assets of the Industry Improvement Fund, without commingling these with other assets, such as the affiliated trade association, expending them in accordance with the purposes of the IIF as set forth in the controlling documents and investing any reserves. The Trustees carry a fiduciary responsibility to oversee the operations of the Industry Improvement Fund.

An Industry Improvement Fund's basic purpose is not one of profit; rather, it is to carry out properly the organization's purposes through program activity. If the Industry Improvement Fund has reserves, they must be prudently invested. Generally, investment standards are set forth in the Uniform Prudent Investor Act or the Uniform Prudent Management of Institutional Funds Act, which vary as adopted in different states. For more information see CHAPTER IV – ADMINISTRATION

TAXATION

To be exempt from federal income taxes, an organization must obtain a determination letter from the Internal Revenue Service *(click for link).* The initial application for exemption requires the completion of Federal Form 1024 *(click for link),* "Application for Recognition of Exemption" under Internal Revenue Code Section 501(c) and the submission of the following information:

- Organizational documents
- Names of fiduciaries
- Financial information
- Sources of income
- Statement as to the purpose of the organization
- Assurance that funds will not inure to the benefit of related parties

Although the determination letter from the Internal Revenue Service usually is sufficient for tax exemption under state law as well, it is imperative that the Trustees verify the steps necessary to obtain exemption from State income taxation. A federal identification number of the Industry

Improvement Fund also should be obtained by filing Form SS-4 *(click for link)* with the Internal Revenue Service.

Annual reports to the Internal Revenue Service are required to be filed on Form 990 *(click for link),* "Return of Organization Exempt from Income Tax." Form 990 is filed if the Industry Improvement Fund has gross receipts in excess of $25,000. If it is less than $25,000, the Industry Improvement Fund is required to file electronically on Form 990-N *(click for link).* The Industry Improvement Fund files Form 990-EZ *(click for link)* if it has less than $1 million in gross receipts and total assets of less than $2.5 million, although the ability to use Form 990-EZ is going to change for tax years 2009 and 2010, so it is essential that the IIF carefully check which is the appropriate Form (990 or 990-EZ) for that tax year. It also files Form 990-T *(click for link)* if it has $1,000 in gross receipts from unrelated business income. There is no unrelated business income tax filing required if net receipts are less than $1,000. **All Forms 990 must be filed by the 15th day of the fifth month of the fiscal year; May 15th for calendar year taxpayers**.

The Form 990 has recently been redrafted. This is the first redrafting of the Form since 1979. It is to be utilized for tax year 2008 and after, meaning returns that will be filed in calendar year 2009 and thereafter. In producing the redraft of the Form 990, the Internal Revenue Service stated that it had three guiding principles, enhancing transparency, promoting tax compliance and minimizing the burden on the filing organization. Unfortunately, the last goal may not have been reached as the American Society of Association Executives has estimated that the new Form 990 will take 50% more time to complete than the original Form 990.

The redesigned Form 990 *(click for link)* consists of an 11-page, 11-part core Form which is to be completed by all filers with an additional 16 schedules to be filed depending on the organization's activities. Unfortunately, the new Form 990 was drafted to address the tax issues raised by charitable organizations qualified under Internal Revenue Code §501(c)(3) and not trade associations or Industry Improvement Funds which are qualified under Internal Revenue Code §501(c)(6) , so portions appear not to be applicable to the operations of an IIF. Nevertheless, the Form 990 needs to be completed and timely filed. All filed Forms 990 will be available for public inspection on an Internal Revenue site.

Problems that Industry Improvement Funds or trade associations may encounter in completing the form are as follows:

- The identification of members vs. independent members which are not designations typically used by trade associations or Industry Improvement Funds.
- The disclosure of the name of every Officer, Director, Trustee and Key Employees, whether or not compensation is paid. In light of the prevalence of identity theft, this level of information can be of concern.
- The disclosure of the five highest compensated employees receiving compensation in excess of $100,000, other than the Key Employee. Again, disclosure of this degree of personal information renders the Key Employee and other employees open to identity theft and raises other personal privacy issues.
- The disclosure on a separate Schedule J of the compensation details regarding Key Employees (compensation exceeding $150,000 for the year).
- The development of percentages of compensation to total program expenses, program expenses to contributions and total expenses to net assets. This test is normally applied to charitable organizations to determine how efficiently they use their charitable dollars. Again, this disclosure has no real applicability to trade associations or Industry Improvement Funds as they are not operating for charitable purposes.
- A statement of how the compensation paid to the Key Employee was determined. For instance, was the compensation determined by independent members of the Board through comparability data and a contemporaneous substantiation of the decision. Was there an independent compensation consultant? Is there a written employment contract? Again, this point relates to charitable organizations. Under the Taxpayer Bill of Rights #2, the IRS was given the right to assess intermediate sanctions for individuals who receive excessive economic benefits from the charitable organization or who knowingly approve such benefits. Although these standards do not apply to trade associations or Industry Improvement Funds that qualify under Internal Revenue Code §501(c)(6), the disclosure is required.

Under the new Form 990, the Industry Improvement Fund is requested to certify whether it has a written conflict of interest policy, whistleblower policy, document retention and destruction policy, record of meeting minutes from that year, audit committee and independent auditor. Samples of these documents are available in **Appendix 6 – Sample Attachements to the IRS 990 Form**. As many of these policies are not legally required, requesting whether they have them or not is misleading, but the inquiry is part of the IRS's position that well defined governance and

management policies and practices improve tax compliance. The Form 990 also asks the process that was used to determine the compensation of its top management officials and how the governing Board reviewed the Form 990 before it was filed.

Further, the governance provisions of the Form 990 requests what methodology is used by the Industry Improvement Fund to make the information available to the public. Since many of these documents do not have to be provided to the public, placing them in the Form 990 is misleading.

Further, under Schedule C *(click for link)* of the Form 990, the Industry Improvement Fund has to disclose all lobbying expenditures and political campaign contributions. That would include any contributions made to a federal political action committee or a state continuing political committee, a disclosure that did not have to be made in the past.

Schedule D *(click for link)* requires the Industry Improvement Fund's auditor to identify and report on its financial statements all material uncertain tax positions in accordance with Financial Accounting Standards Board Interpretation 48 (FIN 48) *(click for link)*. This means that the Industry Improvement Fund accountant will need to identify all uncertain tax positions regarding the qualification of the Fund for exemption under Internal Revenue Code §501(c)(6) and any unrelated business income tax issues in the revenue stream into the organization. Under this Financial Accounting Standards Board Interpretation, the accountant becomes an agent of the Federal and State taxing authorities and the public trust and is not an advocate of his client, the Industry Improvement Fund.

The new Form 990 will place the Industry Improvement Fund under closer scrutiny with greater information required for public disclosure. Further, the accounting industry is required to demand of its Industry Improvement Fund clients, greater internal controls of their financial affairs.

Given the variety of local standards, Industry Improvement Funds should independently verify the annual filings that will have to be done with their domicile state.

Issues always arise on the federal and state taxation of Industry Improvement Funds when new legislation is passed or regulations issued. Industry Improvement Funds must have competent legal or accounting advice to stay abreast of these new issues. Some of the more recent problems are categorized below.

(1) Lobbying

(A) The Omnibus Budget Reconciliation Act of 1993 (OBRA-93) eliminated the deductibility of lobbying expenses for contributing employers for federal income tax

purposes. Through special rules to prevent the "laundering" of these deductions through professional organizations, like an Industry Improvement Fund, amounts paid to those organizations by contributing employers are nondeductible to the extent of the fund's expenditures for lobbying. "Lobbying expenditures" is very broadly defined to include all amounts paid or incurred in connection with influencing legislation (i) through attempts to affect the opinions of any segment of the general public or the general public as a whole, and (ii) through communicating with any member or employee of a legislative body or with any government official or employee who may participate in formulating legislation.

(B) Three key features of OBRA-93 affect Industry Improvement Funds and the affiliated associations that engage in lobbying:

(1) *the estimation rule*, whereby Industry Improvement Funds and trade associations, unless they elect to pay the proxy tax, must notify members at the time of dues assessment or payment what percentages of their dues are estimated to be nondeductible because of anticipated lobbying expenditures;
(2) the *allocation rule*, whereby associations must allocate, on a dollar-for-dollar basis, all expenditures for federal and state lobbying, both in legislatures and at high levels of the federal administrative branch, against dues and similar income received by the associations; and
(3) the *proxy tax*, whereby associations may pay, at the end of the year, a flat 35 percent excise-type tax on their lobbying expenditures and thereby avoid having to notify members of dues nondeductibility.

Tracking and documenting "lobbying expenditures" is an important component of compliance with OBRA-93. Both actual expenditures, such as hiring a lobbyist, and time expended by Industry Improvement Fund employees in lobbying need to be logged. These expenditures will have to be provided on Schedule C of the Form 990.

(2) Spousal Travel Associated with the Industry Improvement Fund

(A) Deduction of expenses relating to a spouse who travels with an Officer, Director, or Trustee of an Industry Improvement Fund are denied unless the spouse is an employee of the taxpayer who is seeking the deduction, the travel of the spouse is for a bona-fide business purpose and the travel expense would otherwise be deductible by the spouse.

(B) Industry Improvement Funds and/or affiliated associations that pay for the travel of its Officers, Directors or Trustees together with their spouses are required to issue Internal

Revenue Service Form 1099 to those volunteers for the expenses for the spouse when they exceed $600.

(3) Taxpayer Bill of Rights II of 1996

(A) Penalties. Penalties assessed responsible persons under IRC §6672, relating to the failure to timely pay trust fund monies for withholding taxes, will not be imposed on unpaid members of a board of trustees of a tax exempt organization if they are:

(i) Serving in an honorary capacity

(ii) Do not participate in the day-to-day or financial operations of the organization

(iii) Without knowledge of the failure to pay.

The penalties are normally assessed against any person who has a responsibility to collect, account for and pay over withholding taxes. The Courts have taken a very broad view of "responsible person" and include any individual who possesses ultimate authority or effective power to pay taxes, creditors or control of the entity's general finances or decision making. The exclusion of unpaid board members is a welcomed clarification.

(B) Public Disclosure. IRC §6104 (e)(1) grants the public the right to review an Industry Improvement Funds annual Form 990. Any member of the public may request in person or in writing copies of the IIF's IRS Form 990. Public inspection rights are expanded to include requests that are in writing and for up to three years of returns. Applications for tax exempt status also may be requested. Penalties have been increased from $10 per day to $20 per day, with a maximum of $10,000 per return for failure to comply with a public request. Penalties assessed for willful failure to comply are increased from $1,000 to $5,000.

(C) Penalties for Failure to File 990 Information. IRC §6652 (c)(1)(A) increases penalties for failure to file Form 990 or to include all required information to $20 per day with a maximum penalty per return of $1,000 or 5% of gross receipts, whichever is less. The penalty is greater if receipts of the Industry Improvement Fund exceed $1,000,000. Failure to file Form 990 or to include all required information is $100 per day with a maximum penalty per return of $50,000.

(4) Unrelated Business Income Tax (UBIT)

(A) IRC §511 requires an otherwise tax exempt organization to pay federal income tax on income derived from business ventures that are regularly carried on and are not

substantially related to its tax exempt purpose. The purpose of this rule is to eliminate a source of unfair competition with for-profit enterprises by placing the unrelated business activities of tax exempt organizations on the same tax basis as those for-profit businesses. A three-part test is used to determine if there is taxable unrelated business income:

(i) The enterprise constitutes a "trade or business" under IRC §162.

(ii) The enterprise must be a "regularly carried on" activity of the tax exempt organization.

(iii) The enterprise must "not be substantially related" to the organization's tax exempt purpose.

For the income to be taxable all three tests must be met. The Internal Revenue Service has, in the past, determined that income received by Industry Improvement Funds or affiliated trade associations for advertising in monthly publications, or advertising revenue from a trade show directory is unrelated business income subject to tax. However, the Internal Revenue Service has determined that income received by way of voluntary contribution, royalty, interest on investments and qualified sponsorship payments are not unrelated business income subject to tax. Because of the importance of this subject it is recommended that before an Industry Improvement Fund becomes involved in a new activity, it seek the advice of a qualified tax attorney or certified public accountant on the tax ramifications.

(5) Audits

(A) Like other income-receiving entities, Industry Improvement Funds are subject to Internal Revenue Service audits and reporting requirements. As a rule, the focus of concern in audits is the use of funds with two basic questions most frequently raised:

(1) Were the uses of the monies received by the Industry Improvement Fund consistent with the purposes set forth in the document establishing the IIF and with the purposes set forth in the exemption as applied for from the Internal Revenue Service?

(2) Did any of the income of the IIF inure to the benefit of an individual person or firm?

The latter question is always an important one, for the more the assets of the Industry Improvement Fund are directed toward industry-wide activities, the less likely it is to be questioned in an audit. On the other hand, the more IIF assets are used for the benefit of particular contractors or a group of contractors, the more likely such uses are to be

questioned. For instance, the IRS has found inurenment where a business league was extending financial assistance and welfare aid to its members, (Rev. Rul, 67-251, 1967-2 CB 196) or there was distribution of non-member income to members in the form of rebates or reduced dues.

CAUTION: The anti-inurement rules are absolute and not a matter of degree. No amount of funds can inure to the private benefit of member firms.

ACCOUNTING: OBJECTIVES AND REPORTING SYSTEM

The objectives of accounting systems are to:

- Record financial activity
- Provide a system of internal control to safeguard assets
- Allow for ease in reporting activity to interested parties
- Provide a base for managerial analysis of program activity

To meet basic reporting requirements, information must be provided currently, using generally accepted accounting principles, which includes financial statements and notes as follows:

- Statement of Financial Position (Balance Sheet)
- Statement of Activities (Profit and Loss Statement)
- Statement of Cash Flow

Other statements and schedules can be developed as needed by the Board of Trustees. When establishing the foregoing statements the Industry Improvement Fund should consult with a certified public accountant experienced in non-profit accounting, Financial Accounting Standards Board criteria ("FASB") and generally accepted accounting procedures.

COLLECTION AND VERIFICATION OF INCOME

Contributions to an Industry Improvement Fund are generally paid on a simple computation of the number of ***hours worked*** under the applicable collective bargaining agreement multiplied by a set amount per hour. Some Industry Improvement Fund contributions may be based on a percentage of the hourly wages ***paid***. Make sure that the compensation base upon which contributions are calculated is clearly stated. Are contributions due on hours worked or hours paid? The latter amount may include time for overtime premium pay, paid vacations, holidays or sick leave for which the Industry

Improvement Fund does not expect contributions. Clarity of language is key to avoiding that issue.

The Fund must ascertain through control procedures that it is receiving all monies that are due by use of the following monthly reporting form provided from all covered employers. This should include such information as:

- Employer name and address
- Period report covers
- The names of employees doing collective bargaining work during the period
- Employee gross hours
- Hours or Percentage multiplied by Industry Improvement Fund's contribution rate
- Payment and reporting instructions

It is more common that contributions to the Industry Improvement Fund are made as part of the employer's contribution to the employee benefit funds, such as a pension fund or welfare fund. This method is the most administratively convenient (just like the union check-off for local union dues). An administrative fee is commonly charged by the collection agent for the employee benefit funds to cover the costs of collection, monitoring and maintaining records of the contributions into the Industry Improvement Fund. It needs to be reasonable in light of the service rendered. When the employer fills out the monthly reporting form, a copy should be sent to the Industry Improvement Fund office for cross checking. In addition, an annual verification by direct correspondence should be made by the IIF's office with the employer as a part of the annual audit. Penalties, such as interest and costs of collection, including reasonable attorneys' fees, should be provided for failure to file and failure to pay any amount due the Industry Improvement Fund. If possible, include the Industry Improvement Fund as one of the parties covered by the bond posted for the employee benefit funds.

AUDITING

The purpose of an audit is to review annually financial documents, legal papers and minutes to assure compliance with statutory and regulatory requirements. It should be performed by a certified public accountant with experience in non-profit accounting, Financial Accounting Standards Board criteria ("FASB") and generally accepted accounting procedures. Best practices

suggest that the accountant should be hired by the Board of Trustees of the Industry Improvement Fund, or an Audit Committee of the Board, and not by the staff of the Industry Improvement Fund.

Subject to the new Statements of Auditing Standards discussed below, the accountant in performing the audit generally seeks to express an opinion on whether the financial statements of the Industry Improvement Fund fairly presents, in all material respects, its financial position. Generally accepted accounting standards require the accountant to plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatements. The accountant will examine, on a test basis, evidence supporting the amounts and disclosures in the financial statements. The audit also includes assessing the accounting principles used and significant estimates made by the staff as well as evaluating the overall financial statement presentation.

As a result of the Sarbanes Oxley Act of 2002, there have been some changes in the accounting structure for Industry Improvement Funds. First, pursuant to Statement of Auditing Standard (SAS) 112, accountants to an Industry Improvement Fund are required to identify in writing any "significant deficiencies" and "material weaknesses" in its identified, "internal controls."

"Internal control" is the process by which an IIF ensures accurate financial reporting; the achievement of organizational objectives; and compliance with the Internal Revenue Service (IRS) guidelines and other applicable regulations. The IIF's internal control process needs to be implemented by management (*i.e.*, a controller) and, to be effective, should consist of documented policies and procedures that should be reviewed by the Board of Trustees. Auditing standards categorize internal control into five components:

1. Control of environment – Attitude of the Trustees and management toward control.
2. Risk assessment – The process the Trustees and management use to identify control risks.
3. Control of activities – Policies and procedures.
4. Information and communication – How the internal control process is communicated.
5. Monitoring – The process by which the performance of internal control is evaluated.

It is important to recognize that internal control is a cumulative process involving both policies and the people who implement them.

A "significant deficiency" is a control or combination of controlled deficiencies that adversely affects the Industry Improvement Fund's ability to initiate, authorize, record, process or report its financial data reliably. A "material weakness" is a significant deficiency or combination

that results in more than a remote likelihood that a material misstatement of the financial statements of the Industry Improvement Fund cannot be prevented or detected.

The following are just some examples that would raise control deficiencies for the IIF's auditor:

- No written fraud policy.
- No cash disbursement policy.
- Bank statements sent to the clerk in charge of disbursements.
- Invoices for professional fees not authorized prior to payment.
- Financial information and supplies not in a secured location.

It would be standard procedure for the accountant for the Industry Improvement Fund to provide an annual written statement under SAS 112 as to these new auditing standards.[8]

Another result of the financial reporting scandals and audit failures is Statement on Auditing Standard 114, The Auditor's Communication with Those Charged with Governance, which requires auditors to communicate certain matters stemming from the financial statement audit. The reporting required under SAS 114 is in addition to that required by SAS 112. SAS 114 draws a distinction between those charged with management and those charged with governance and requires the auditor to report to those charged with governance. The auditor deals with management constantly during the course of the audit and may lose sight of the need to communicate with those who have ultimate responsibility for the IIF, the Board of Trustees.

The auditor's responsibilities under generally accepted auditing standards including SAS 114, and an overview of the planned scope and timing of the audit are typically covered by the engagement letter. Additionally, the auditor's responsibility will be stated in the audit report, which will indicate the auditor is responsible for opining on the financial statements and that management, not the auditor, is responsible for the financial statements. This will be the case even if the auditor assists in the preparation of, or prepares, the financial statements. The accounting profession wants to make sure that management cannot be absolved of its responsibility for the financial statements by having the financial statements prepared or audited by the auditor.

An Industry Improvement Fund can therefore expect the following representations from its auditor.

- The auditor does not guarantee the accuracy of the financial statements; instead, the objective of an audit in accordance with generally accepted auditing standards is to provide

reasonable (not absolute) assurance about whether the financial statements are free of material misstatements due to fraud or errors. Reasonable assurance is defined in the auditing standards as a high level of assurance and means there is still a risk that, after the audit is completed and an unqualified or clean opinion is rendered, there is still a slight chance of a material error or fraud in the financials.

- Management, not the auditor, is responsible for implementing a system of internal controls.
- Management is responsible for the selection and application of accounting principles. The specific accounting principles followed by the IIF are usually found in the first or second footnote disclosure to the financial statements and are referred to as "accounting policies."
- The audit is not a form of internal control.
- The auditor is to provide an overview of the scope and timing of the audit, without compromising the effectiveness of audit. That is, the auditor does not indicate how samples are selected or what items will be tested. The overview will include the following components:

    (i) Audit tests are performed on samples of transactions; that is, the auditor does not conduct a detailed examination of all transactions. As a consequence, the auditor will not find all misstatements in the financials.

    (ii) Types of audit evidence used—confirmations, inquiries of management, analytical procedures, etc.

    (iii) Anticipated start and completion dates of the audit, including the performance of interim procedures.

    (iv) The auditor's response to significant risks of material misstatement.

    (v) The extent of reliance on internal audit, if the IIF has internal auditors.

"Significant findings" are to be reported from the audit regarding the financial reporting process, other than those required to be reported under SAS 112 and in the management letter. Such findings include the following.

- Use of any estimates in the financial statements.
- The appropriateness of the accounting policies.
- Significant difficulties encountered during the audit include:

    (i) Inadequate time to do the audit

    (ii) Delays in management responding to audit requests.

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8 *Cutting to the Heart of SAS 112*, November 2007, www.ifebp.org, Benefits & Compensation Digest

(iii) Above-normal effort incurred in obtaining sufficient appropriate audit evidence; that is, inadequate assistance by management in providing records, schedules and other information for the audit.

(iv) Unwillingness by management to provide information regarding how it intends to deal with the plan's ability to continue as a going concern.

- Material corrected misstatements. Significant discrepancies discovered during the audit whether corrected by management or by the auditor (with management's approval) should be brought to the attention of those charged with governance.

At the conclusion of the audit, the auditor should discuss the audit report, the financial statements, including significant estimates and accounting policies, and the contents of the management representation letter. The communication under SAS 114 may or may not be in writing. It could be oral if this is deemed adequate or formal as in writing a letter to the Board of Trustees.[9]

The IIF's accountant must also comply with Financial Accounting Standards Board Interpretation (FIN) 48. FIN 48 requires audit recognition of all material deficiencies on certain tax positions. In the interest of transparency, the accountant must now analyze whether the Industry Improvement Fund is still qualified as a tax exempt entity under State and Federal law and must analyze all revenue streams and activities to determine any unrelated business income, including its calculation and allocation. If any unrelated business income is present, the amount of the tax that would relate to it must be recognized on the Industry Improvement Fund's financial statements, not only for the current year but for prior years, including any penalties or interest.

9 *Statement on Auditing Standard 114: The Auditor's Communication With Those Charged With Governance,* September 2008, www.ifebp.org, Benefits & Compensation Digest

CHAPTER IV – ADMINISTRATION

DUTIES AND RESPONSIBILITIES OF TRUSTEES OR OFFICERS

The Trustees under a trust agreement or officers of a non-profit corporation have several legal duties and responsibilities that go beyond ordinary standards of commercial dealing. The first and foremost duty owed by a Trustee/officer is a duty of loyalty. Because the Trustees/officers are charged with responsibility to effectively administer and distribute someone else's money, they carry a fiduciary duty in relation to the beneficiaries of the trust or non-profit corporation. As a result, a Trustee/officer is not allowed to engage in self-dealing, which would be to place himself in a position where he acts for his own benefit or where Industry Improvement Fund assets would be used for his exclusive benefit. Every state law has this prohibition. It is imperative that a Trustee immediately disclose to the Board and Officers of the Industry Improvement Fund when there could be a breach of the duty of loyalty or conflict of interest.[10]

CAUTION: There is no defense to self dealing by a Trustee. It does not matter that the transaction was fair and reasonable or even if it was in good faith by all parties; the duty of loyalty outweighs whatever benefit may accrue to the Industry Improvement Fund.

A second duty requires the Trustees to comply with their governing documents. The Trustees administer the Industry Improvement Fund in accordance with the Trust Agreement or Certificate of Incorporation and By-Laws and have only the powers granted by those documents which are necessary to carry out its stated purposes. The controlling documents should provide that the Trustees determine all questions arising in its administration, interpretation and application according to specific authority granted in the documents. As a statement of general legal principle, a determination made in good faith by the Trustees is conclusive and binding. It is important that the Trustees realize that in all their actions and endeavors, they must look to the provisions of the Trust Agreement or Certificate of Incorporation and By-Laws for authority and direction; otherwise they are subject to charges that they breached their fiduciary obligations.

The Trustees are presumed to know all the provisions of their controlling documents. Therefore, it is advisable that each Trustee have a manual that contains some or all of the following:

Basic Documents:

10 A suggested form of Conflict of Interest Questionnaire is included in the Appendix of this Guide for Trustees and Officers to complete for all known conflicts.

- A calendar of dates and events compiled for the year listing Board, Committee and other significant meetings, activities and deadlines, which can be updated periodically;
- Agreement and Declaration of Trust or Articles of Incorporation, and any amendments to such Articles;
- Current By-Laws;
- Mission Statement;
- A listing of names, addresses and phone numbers of the Directors and Officers of the Industry Improvement Fund;
- A list of Committees, including the name of each Committee Chair and all Committee members;
- A list of employees of the Industry Improvement Fund, including positions, addresses and phone numbers

Additional Material:

- Minutes of Board and Committee meetings;
- Financial Statements of the Industry Improvement Fund for the prior fiscal year and the operating and capital budget for the current year;
- Chart or explanation of the relationship of the Industry Improvement Fund to any affiliated trade associations;
- Current Collective Bargaining Agreements;
- Current news releases;
- Annual Reports for the past two or three years;
- Conflict of Interest, Whistleblower, Document Retention and Destruction, Compensation and other relevant policies; and
- Short range and long range plans.

It is also recommended that new Trustees be provided with an orientation so they become familiar with the Industry Improvement Fund records, financial reports and current internal controls (flow of dollars in and out and reconciliation procedures).

In all functions, the Trustees operate independently, each exercising his best judgment on all questions. While a Trustee may, if he wishes, consult with the organization that appointed him, he is not bound to do so, and no instruction from that organization is binding. A Trustee could only act in accord with other appointing organization if that also was in accord with an Industry Improvement

Fund fiduciary duty. A Trustee, however, will be bound to the decisions of his co-Trustees, even when he is not present at a meeting when action is taken. To be free of liability, a Trustee's negative vote must clearly be noted in the meeting record, or, in the case of a particular egregious act, such as knowledge of the theft of Industry Improvement Fund assets by a co-Trustee, the Trustee must to take affirmative action. Regular Board attendance and review of meeting minutes should be the standard for every Trustee.

Another important duty requires the Trustees to collect and take control over the assets entrusted to their care and not commingle them with other assets. Further, the Trustees must make those assets productive by investing them prudently. The Trustees should select a depository and deposit such portion of the organization's funds in interest-bearing accounts as they deem prudent and create such checking accounts as are convenient. The Trustees may also invest portions of the funds in government bonds, stocks, common or preferred, bonds and mortgages and other evidences of indebtedness or ownership, but consideration should be given, when creating the Trust, whether to restrict such investments by the Trustees to securities or other property of the character authorized by applicable law from time to time for trust investments, (sometimes known as the "legal list").

It is imperative that the Trustees determine the applicability of the Uniform Prudent Investor Act in their state. The Act is a uniform law that makes five fundamental changes from existing state standards;

(i) The prudent investor standard applies to the entire portfolio, not just each individual asset;

(ii) The Trustees central focus must be the analysis between risk and reward;

(iii) The restrictions on the type of investments that Industry Improvement Fund reserves can hold are removed;

(iv) The Trustees must diversify the reserves across several types of investments; and

(v) The Trustees should seriously consider delegation of the investment function to a professional investment manager.

The applicability of the Uniform Prudent Investor Act to the Industry Improvement Fund may be superseded by another uniform law known as the Uniform Prudent Management of Institutional Funds Act. The later Act, however, is usually applicable to endowments for educational, religious, hospital or other charitable institutions. Also, the standard of care under the Uniform Prudent Management of Institutional Funds Act is lower than the Uniform Prudent Investor Act. It only requires that the Trustees make an ordinary business judgment under the facts and circumstances prevailing at the time of the action or decision as opposed to the "prudent expert"

standard applied to the fiduciaries under the Uniform Prudent Investor Act. Check for applicability under the statutory law for the state of the Industry Improvement Fund.

Trustees may adopt policies as they deem desirable for the conduct of their affairs. Again, such actions of the Trustees must be within the scope and authority granted by the controlling documents and should be clearly noted in writing. Any policies should be carefully recorded and maintained with the controlling documents so they can be passed on to subsequent Trustees. It would be imperative for the Trustees to have a policy with respect to delinquencies, and to make a periodic review of delinquencies and action to be taken thereon. Best practices and efforts by the Internal Revenue Service and the accounting industry suggest at a minimum that the Trustees have written policies regarding Conflicts of Interest, Whistleblower, Document Retention and Destruction, Compensation and Auditing including Form 990 preparation.

The Trustees may employ any necessary personnel, obtain office facilities and equipment and enter into any and all contractual relationships within the scope of the purposes of the IIF and under express authority granted by the controlling documents. They may direct the execution of policies, either delegating such execution to employees, if the controlling documents so allow, or retaining authority as the Trustees. The Trustees, however, cannot delegate all their duties and responsibilities. Any delegation of duties should be in writing.

They may appoint accountants, lawyers, specialists and other persons, as they deem necessary or desirable, in connection with the administration of the Industry Improvement Fund. An annual review of these appointments is desirable. Trustees generally are entitled to rely conclusively upon actions taken by appointees in good faith. They also are generally entitled to rely upon any opinions or reports that are furnished to them by any accountants, attorneys or other specialists.

The Trustees must keep suitable records of all of their proceedings and acts, and all books of account, records, and other such data as may be necessary for proper administration of the Industry Improvement Fund. Such records preferably should be maintained by a certified public accountant, although pursuant to SAS 114, all financial records will be deemed to be those of the Trustees and management. Further, the budget categories utilized should relate to "purposes" set forth in the controlling documents or the categories listed in the original filing with IRS for tax exemption.

No Trustee should incur any liability for any action or failure to act, except for his own gross negligence or willful misconduct. The governing documents should indemnify each Trustee against any and all claims, loss, damages, expense and liability, unless judicially determined to be due to the gross negligence or willful misconduct of such Trustee. That type of malfeasance will not be

covered by insurance. It would be wise for the Industry Improvement Fund to carry "Directors and Officers" professional liability insurance.

A successful legislative effort affecting the personal liability of Trustees of Industry Improvement Funds was made in 1997 with the enactment of the Volunteer Protection Act. This Act was intended to provide limited protection from liability to volunteers serving non-profit organizations and governmental entities. The Act protects "volunteers," including those involved in non-profit Section 501(c)(6) organizations from liability for harm caused by ordinary negligence and liability for punitive damages unless the act was willful, criminal or was committed with flagrant indifference to the individual harmed. Under the Act, volunteers are not shielded from negligence or punitive damages for acts which occurred before the effective date of the Act, September 16, 1997. The Act also does not protect volunteers from negligence or punitive damages if the harm results from a crime of violence, a hate crime, sexual offense, federal or state civil rights violation or is committed while under the influence of intoxicating alcohol or any drug. Further, no protection is offered from negligence or punitive damages for acts between the volunteer and the non-profit organization. Lastly, there is no immunity provided for the non-profit organization.

With respect to Industry Improvement Funds, the Volunteer Protection Act applies to the Fund Trustees unless there is some federal court that expressly determines that it does not. Industry Improvement Fund Trustees are therefore protected from liability arising out of ordinary negligence so long as they are acting within the scope of their responsibility in the non-profit organization. Protection is also afforded so long as the Trustee was properly licensed, certified, or authorized by the appropriate authority for the activities within which the harm occurred, the Trustee did not cause the harm through willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious flagrant indifference to the rights or safety of the individual harmed, and the Trustee was not operating a motor vehicle, vessel, aircraft or other vehicle for which a license is required at the time the harm was caused.

The Act specifically preempts all state laws that are inconsistent except (1) any state law that provides additional protection, (2) any state law that requires risk management procedures, a source of financial recovery, or applies the "*respondeat superior*" doctrine (that is, would require the Industry Improvement Fund to pay for the misfeasance of its employees), (3) any state or federal law that limits award of punitive damages, or (4) any state that opts out of the effect of the legislation by enacting a statute specifically referencing the Act.

DUTIES AND RESPONSIBILITIES OF ADMINISTRATOR

The Industry Improvement Fund Administrator is responsible for carrying out policy as established by the Trustees. Duties include carrying out all responsibilities that may be necessary, suitable or proper for the accomplishment of any of the purposes or the attainment of any of the objectives of the Trustees, either alone or in conjunction with other individuals or organizations. The Administrator must exercise diligence in advising the Trustees of plan activities and expenditures so that the Trustees can be assured that they are operating within the purposes of the Trust. Further, the Administrator should offer leadership to the Trustees in proposing programs and activities that address industry needs, and an overall program that balances any divergent interests of those contributing to the Trust.

BUDGETING AND ACCOUNTING

Budget preparation is usually undertaken and completed by the Industry Improvement Fund Administrator. In preparing the budget, the Administrator will attempt to forecast income during the coming year. Statistical records of hours and income are excellent sources of information for forecast purposes, along with an attempt to project increases or decreases in construction activity one year in advance.

Budgets vary widely according to funding and to the priority given to various programs or activities. A "balanced" overall program is recommended. A percentage of the total income or a specific sum may be assigned to each budget category depending upon the needs of the Industry Improvement Fund.

Budget categories should relate to the "purposes" set forth in the controlling documents or the categories listed in the original filing with the IRS for tax exemption.

Representative Budget Categories for Chart of Accounts:

- *Workforce development* – Outreach, recruiting, minority outreach, WBE development.
- *Education and Training* - Supervisory development, environmental systems, balancing, first aid and safety, apprentice education, productivity and journeymen skills upgrading programs.
- *Market and Methods Research* - Hours and manpower data analysis, manpower and market forecasts, contractor activity survey and support for Industry Improvement Fund sponsored research.
- *Advertising, Public Relations, Sales Promotion* - Magazine and newspaper advertising, radio and television production and time costs, display posters and exhibits, folders and brochures, newsletters and releases, hard hat promotion, subscriptions.
- *Dinners, Banquets, Receptions* - Architect/engineer/owner/trade dinner; miscellaneous architectural and engineering society functions, subsidies for national association program attendance.
- *Grants and Contributions* - Health and safety, college construction degree program support, community capital improvement, research programs by professional societies, community relations.
- *Administrative* - Salaries and benefits, rent, maintenance, office expense, taxes, legal and accounting, investment manager or bank trust administration, travel and meetings, insurance, auto expense. Trustees may elect to allocate the major portion of "salaries and benefits" to various specific programs or budget categories. This is advantageous if the Industry Improvement Fund purchases services from the Association and others, or has no paid staff of its own. It also presents a clearer picture of the actual cost of each budget category. As fund operations tend to be staff or labor intensive, it is best to distribute that cost rather than show it as a lump sum.

It is recommended that a "line-type" budget be established. This allows the Trustees to compare each line of the budget at their meetings throughout the budget year. It also allows the Trustees and staff to control each type of expenditure. Accounting for expenditures of Industry Improvement Funds should give a clear "paper trail" and be sufficiently detailed and supported. **"Lump sum" billings for services to the fund from the affiliated Trade Association without breakdown should be avoided.** The Industry Improvement Fund should not be a mere collector and distributor of funds. It is particularly important when the fund and the Association share the same administrative personnel that inter-organization billings be broken down and well documented.

NOTE ON FINANCIAL RESERVES:

While the purpose of an Industry Improvement Fund is to meet the needs of the industry and not to accumulate excessive reserves, at least one to two year's operating expenses should be accumulated for reserve purposes, if possible. Many programs will be long-range in nature, and collections may be disrupted for any number of reasons. (*e.g.* economic slowdown, work stoppages and strike or lockout). Hence, a reasonable reserve is both necessary and desirable. Although there is no legal proscription on the size of a reserve, the Internal Revenue Service discourages large reserves for tax exempt organizations that are not justified by prior activities; therefore, the reserve should be established under the guidance of a tax attorney or a certified public accountant. Investment income on the reserves is not unrelated business income subject to tax.

INSURANCE

Each Industry Improvement Fund should carry adequate insurance to protect the Trustees, Officers and employees. Besides Worker's Compensation Insurance which will be required by the state law of the domicile of the Industry Improvement Fund, insurance should cover the following categories:

- Errors and omissions insurance covering the Trust or Corporation and Trustees. If the Fund supports welder certification or testing and balancing programs, it is important that the policy cover "testing" operations. (Collective bargaining and antitrust coverage frequently are excluded or given limited monetary coverage.)
- Automobile liability insurance, if vehicles are owned by the IIF.
- Publishers' liability insurance if a newspaper/magazine is published by the IIF.
- Liability insurance coverage for the IIF office facilities.
- "Host liability" insurance for the IIF if "events" are sponsored, particularly if liquor is served.
- Fire, extended coverage, vandalism, and theft insurance on property owned by the IIF.
- Accident policy covering the Trustees and Officers traveling to and from meetings or any other trips involving Industry Improvement Fund business.
- Employee Practices claims coverage covering discrimination, job bias, harassment, and other statutory or common law claims. This coverage is distinct from general liability coverage or coverage from personal or bodily injury.
- Fiduciary liability insurance for employer trustees on the jointly administered employee benefit funds if the Industry Improvement Fund is the appointing party, if not, the affiliated Trade Association should obtain it. Also, if the Industry Improvement Fund has it own employee benefit plan, a fiduciary liability policy should be obtained.
- Some States require special policies that may differ from those of the State in which the Fund is located/incorporated.
- Additional insurance should be considered to cover contributing contractors who are active in Committee or special assignment work for the Fund.
- "Non-Owned" automobile insurance.
- An ample Liability Umbrella policy over the entire Industry Improvement Fund operation.

COMMUNICATIONS WITH FUND CONTRIBUTORS

The Industry Improvement Fund should be responsible to its contributors by keeping them advised as to its activities. Some of the means to accomplish this are:

- Bulletins
- Day to day service, either by personal contact, telephone, fax or internet, when needed
- Periodic reports of meetings
- An Annual Report
- Sponsored functions with specific user groups, such as owners, architects, engineers and specification writers, relating Industry Improvement Fund services and contributors to that audience.

RELATIONS WITH LOCAL ASSOCIATION

There should be a strong liaison between the Industry Improvement Fund and the local trade association. This relationship can be developed in a number of ways. The most efficient is through the coordination of the programs of the Industry Improvement Fund with the local trade association, to try to avoid duplication of effort and expense. Quite often the same administrative personnel are employed by the Industry Improvement Fund and the local trade association. If this is not the case, consideration can be given to contracting certain parts of the Industry Improvement Fund program to the local trade association. The most effective in terms of effort and cost, is for the Industry Improvement Fund and the trade association to utilize a single staff employed by the association. This will insure against competing and separate agendas. This, of course, does not preclude the Fund from directly "contracting out" for special services such as marketing, publishing, or educational programs.[11]

CAUTION: IT IS IMPORTANT THAT THE MONIES AND EXPENDITURES OF THE IIF AND OF THE LOCAL TRADE ASSOCIATION BE KEPT STRICTLY SEPARATE AND THAT THE INDUSTRY IMPROVEMENT FUND'S ACCOUNTS BE MAINTAINED SUBJECT TO REGULAR AUDITING AND FULL DISCLOSURE.

FUND OBJECTIVES

11 A draft Administrative Services Agreement is available in **Appendix 4** -- **Agreement between Industry Improvement Fund and Association for Administrative Services**
(click for link)

The Industry Improvement Fund should develop a set of long-term and short-term objectives, together with a statement of policy regarding the level of responsibility of IIF Trustees.

It is recommended that the statement of objectives be reviewed on an annual basis. This effectively forces the Trustees and Administrator to undertake an ongoing review and enhances the understanding of and agreement with the objectives and scope of activity of the Industry Improvement Fund.

The lasting value of this "blueprint" far outweighs the time and energy invested in its development. It determines the policy under which the Administrator should operate. Trustees must depend on the capability of the Administrator to assist in originating worthwhile programs, to seek advice and consent of the Trustees, to develop policies when required, and then, to execute what the Trustees have approved.

LONG RANGE OBJECTIVES OF INDUSTRY IMPROVEMENT FUND

- To encourage the continuing investment by construction purchasers in the establishment of new facilities or the renovation of existing facilities within the area served by contractors supporting the mechanical contracting Industry Improvement Fund.
- To promote productive labor and employer relations in the skilled trades allowing the employer to deliver a "best value" project.
- To establish the mechanical contractor as a prime source of information for the design, installation and servicing of mechanical process or environmental systems and green and sustainable building practices.
- The representation of the interests of the mechanical contracting industry in the development of bidding and construction documents and procedures that uphold the mutual interests of contractor and purchaser.
- To identify, define and evaluate such economic, social, technical or product developments that will affect the qualitative or quantitative needs for future mechanical contracting industry skilled trade workers.
- To engage in effective public policy research, advocacy and representation to promote the best interests of the industry.

SHORT RANGE OBJECTIVES OF INDUSTRY IMPROVEMENT FUND

- Utilize appropriate advertising campaigns which will present the union mechanical contracting industry capability and quality to the maximum possible number of industrial, commercial, institutional and residential product and service buyers.

- Conduct a publicity program designed to inform the purchasing public of the mechanical contracting industry capability through mass media editorial coverage.

- Inform on a regular basis all contributing fund members, architects, consulting and plant engineers and all others having a relationship with the mechanical contracting industry of the activities and accomplishments of mechanical contractors.

- Maintain a close relationship and joint participation with piping trades unions in the conduct of apprentice training efforts that are consistent with the programs of contractor trade associations.

- Promote the relationship with field employees utilizing publications, pride of membership and pride of workmanship campaigns.

- Review present supervisory management study programs for appropriate improvement and continue a program of owner-manager oriented management courses.

- Continue, update or otherwise improve the reliability of manpower requirements as forecast for a period of three to five years.

- Study and recommend positions on state and federal legislation which will affect the mechanical contracting industry.

- Improve methods of personal communications with architects, plant engineers, general contractors and others influential in industrial and commercial piping markets.

- Create advisory boards which can act as forums on service and maintenance, productivity and industrial commercial work, with annual meetings, expositions, etc.

- Cooperate with all qualified organizations in promoting safety within the mechanical contracting industry.

- Examine critical industry issues such as affirmative action and equal employment opportunity, disadvantaged business issues and develop programs to address them.

- Set up human resources programs including recruiting, productivity, etc.

- Coordinate with the Association signatory to the Industry programs and activities designed to improve the operation of an image presented by the mechanical contracting industry as a whole.

INDUSTRY IMPROVEMENT FUNDS AND THE ANTITRUST LAWS

Industry Improvement Funds and trade associations perform useful functions for the betterment of the industry they serve and that is why they are recognized for tax-exempt treatment by each State and the Internal Revenue Code. They provide current information about industry developments, set product and safety standards and aid consumers in comparisons of products and services. Trade association and Industry Improvement Fund activities that follow these guidelines will be lawful and appropriate. However, it is important to remember that the use of Industry Improvement Funds to further non-competitive practices constitutes a violation of federal and state antitrust laws.

The purposes of federal antitrust laws are to maintain free and unfettered competition and to eliminate unreasonable restraints on trade. An antitrust violation is typically a violation of one of three federal statutes: (1) The Sherman Act; (2) The Clayton Act as amended by The Robinson Patman Act; and (3) The Federal Trade Commission Act (the "Acts"). A violation of these Acts carries with it not only civil penalties and fines, but also criminal penalties, up to and including incarceration. Most States have copied these federal statutes into their own body of statutory law, so you need to be aware that violations of either federal or state antitrust laws will be a violation of the other.

SIMPLE ACTIONS CAN LEAD TO COMPLEX ANTITRUST VIOLATIONS
For example, there may be liability if:

1. THE ASSOCIATION OR INDUSTRY FUND THROUGH ITS OFFICERS AND DIRECTORS ACTS OR MERELY MAKES A COMMENT ABOUT PROHIBITED ACTIVITY;
2. MEMBER FIRMS ENDEAVOR TO UNDERTAKE COMMON ACTION BASED UPON THOSE ACTS OR COMMENTS;
3. THERE IS A CAUSAL RELATIONSHIP BETWEEN THE ASSOCIATION'S ACTION OR COMMENT AND THE ACTIONS OF ITS MEMBERS;
4. THE COMMON ACTION RESULTS IN AN UNREASONABLE RESTRAINT ON COMPETITION SUCH AS A GROUP REFUSAL TO DEAL (A PER SE VIOLATION, WHICH REQUIRES NO PROOF OF MARKET IMPACT);

THEN A VIOLATION OF THE ANTITRUST LAWS MAY BE FOUND

The Antitrust Division of the Department of Justice and the Federal Trade Commission are charged with vigorously investigating all complaints they receive of illegal activities by trade associations (private individuals or other rival associations can also file complaints). While there have not been any antitrust actions brought specifically against an Industry Improvement Fund by the Department of Justice or the Federal Trade Commission, the government has prosecuted both large associations, such as the National Automobile Dealers Association[12] and smaller associations, such as the National Turtle Farmers and Shippers Association, Inc. of Louisiana.[13] It is important to remember that the size of the organization has no bearing on whether it will be targeted by the Department of Justice or the Federal Trade Commission. Each and every trade association, whether large or small, is equally subject to compliance with federal and state antitrust laws.

Many violations of the antitrust laws are known as per se violations; violations that restrain competition by their very nature without proving actual market impact. Involvement in any such action is deemed to be a violation of the antitrust laws even if the action does not result in any economic harm.

Per se violations include:

- Activities that attempt to stabilize, increase or lower prices or attempt to change profit margins
- Attempts to limit production among members
- Attempts to allocate markets among members
- Effecting a boycott or group refusal to deal with suppliers, market competitors, or relevant markets to the industry

An action that does not fall into one of the categories of per se violations may nevertheless be a violation of the antitrust laws. An alleged violation that falls outside the purview of the per se violations will be scrutinized under a different level of judicial scrutiny, known as the Rule of Reason. Under the Rule of Reason, the individual facts and circumstances surrounding the action at issue will be analyzed to determine the economic impact, if any. If the economic impact on the market is significant, then a violation of the antitrust laws has occurred.

12 92 F.T.C. 1050
13

PRICE FIXING

Price fixing includes any effort to lower prices, raise prices, stabilize prices or affect profit margins. The overall impact of these efforts is typically a decrease in competition and increase in consumer prices.

The landmark case pertaining to construction Industry Improvement Funds and price fixing is National Electrical Contractors Association, Inc. v. National Constructors Association.[14] In that case, the court found that the National Electrical Contractors Association ("NECA") and the IBEW had agreed at the national level that all IBEW contracts would include a clause requiring that one-percent (1%) of gross wages paid by employers to labor would be paid to the National Electrical Industry Fund. The plaintiffs, who were union contractors but not members of NECA, alleged that the required payment eliminated a price advantage that they enjoyed by not paying the Industry Fund – taking it out of contracts as a permissive subject of bargaining. The Court agreed that the IBEW/NECA contract provision amounted to price fixing and entered an injunction against NECA. In so doing, the Court effectively enjoined the utilization of a national Industry Improvement Fund under the IBEW/NECA agreement.

The Case of the Price-Fixing Lawyers

In United States v. The American Bar Association, the Department of Justice charged the American Bar Association ("ABA") with using its power to force law schools to inflate faculty salaries and benefits.

Having ABA accreditation is essential to the success of any law school. The accreditation program is run by the ABA's Section on Legal Education (the "Section"); membership in that section was overwhelmingly comprised of law school faculty members.

In order for a new law school to pass the Section's requirements for accreditation, they were required to demonstrate that their teaching salaries were comparable to those of other accredited schools. The Section also required that each accredited school submit detailed salary information so that they could measure compliance with its requirement.

The Department of Justice ("DOJ") charged the Section with manipulating this requirement by permitting the faculty of the law school under review to select their own law school peer group with which to compare salaries. Not surprisingly, the faculty often chose higher ranked schools or schools in higher cost areas, which obviously inflated their salary levels. The DOJ was able to find a number of instances in which law schools were denied accreditation for having inadequate salary structures. This was clear price fixing in the eyes of the DOJ.

The case was resolved by consent decree. Under the decree, the Section cannot impose any comparative salary requirements for accreditation or collect any comparative data. Further, a special commission was formed within the ABA to advise the Court on several other questionable accreditation requirements that were less obvious then the salary fixing requirement.

14 678 F.2d 492 (4th Cir. 1992) cert. dismissed 463 U.S. 1233-34 (1983)

Price fixing liability occurs across all industries and occupations. For example, in Korean Video Stores Association of Maryland, et al.,[15] the sixteen members of the association decided that they would not charge less than $1.50 per tape rental. All individual members agreed to this minimum price and posted it in the windows of their stores. Within twelve months the Federal Trade Commission charged the Association with violating Section 5 of the Federal Trade Commission Act for "interfering or tampering with the retail prices of Korean language video tape rentals…"

The Council of Fashion Designers of America ("Council"), which controls the major New York fashion shows, was much more subtle in their price fixing endeavors.[16]

The Council sought to reduce competition amongst themselves for modeling services in order to reduce the fees they paid for models.

The Council threatened the sixteen largest modeling agencies in New York City that unless they would agree upon a fixed price for fashion shows, the members of the Council would bypass the agencies and instead hold open calls for models. The modeling agencies consented and agreed to the fixed price. Within the next year, the Federal Trade Commission brought an action against the Council. The matter was settled by consent order, whereby the Council agreed that it would no longer collectively seek to raise, lower or fix prices or other terms and conditions of compensation for modeling or modeling agency services.

It is somewhat surprising that Associations are still involved in price fixing. It is important to remember that actions falling into this category constitute a per se violation of the antitrust laws.

Simple Guidelines to Remember with Respect to Avoiding Price Fixing Challenges or Liability:

- Although unions have certain exceptions from the antitrust laws, signatory contractors cannot collaborate with a union to insert a provision in a collective bargaining agreement that requires non-signatory employers to make a mandatory contribution to its Industry Improvement Fund.
- IIF public and private construction policy analysis and advocacy can encompass other expressions relating to business or contracting practices, for example, owner building, purchasing or contracting practices. Great care must be taken to make sure policy discussion is not controlled as market action.
- Price fixing encompasses more than an overt agreement among members to fix a minimum price. It includes any effort to lower, raise or stabilize profits as well as any activity that has an impact upon margins of profit or other collective business practices—for example, collusion on bidding, which must be

15 119 F.T.C. 879
16 120 F.T.C. 817

RESTRAINTS ON ADVERTISING

An Association or Industry Improvement Fund may not restrain individual members from advertising in an adverse fashion to other members from the same industry. For example, the Arizona Automobile Dealers Association was found to have violated antitrust laws by prohibiting its members from engaging in advertising that included (1) statements that their prices were equal to or lower than competitors; and (2) statements that made disparaging comparisons with competitors' services, quality, price, products or business methods.[17] The Association even went so far as to terminate any member that refused to abide by its restrictions.

An Industry Improvement Fund may legitimately seek to prohibit false or deceptive advertising. Therefore, when dealing with a potential restraint on advertising, the question to ask is, "Does the Associations or Industry Improvement Fund's action have the potential to restrain members from utilizing truthful non-deceptive advertising?" If the answer is yes, then it is likely that the action is likely a violation of the antitrust laws.

BOYCOTTS AND GROUP REFUSALS TO DEAL

It is an antitrust violation for a Trade Association or Industry Improvement Fund to request that its members boycott or refuse to deal with a particular organization or company. Boycotts generally take two forms: In a "horizontal group boycott," competitors within the same market agree not to conduct business with other market participants. By contrast, in a "vertical boycott," individuals at different levels of the market chain agree not to conduct business with other market participants. It is important to remember that engaging in a "horizontal boycott" is a per se violation of antitrust laws. Practices adopted by some medical and physician associations make perfect examples of horizontal boycotts prohibited under antitrust law:

- In 2006 a physicians' independent practice association in Texas engaged in illegal commercial business practices in an attempt to negotiate higher fees for its individual members. The 80-member association collectively negotiated with two health insurance plans and boycotted a third plan. The Association was able to negotiate reimbursement

17 117 F.T.C. 781

rates that were between twenty and ninety percent higher than rates of individual members, but they also caught the attention of the Federal Trade Commission.[18]

- The Federal Trade Commission also announced, in 2006, that it was challenging the conduct of several Chicago organizations that represented more than 2,900 independent Chicago area physicians. At the behest of the organization, the physicians agreed to fix prices and refused to deal with certain health plans except on their collectively determined terms.[19]
- The Federal Trade Commission has reached as far as Puerto Rico to root out antitrust violations. For instance, the Medical Association of Puerto Rico sought to form a boycott of a third party insurer that refused to raise reimbursement rates or adopt an exclusive referral rule to psychiatrists who were members of the Medical Association.[20]

What do these examples have in common? They all represent an effort by an Association and its members to use their collective clout to boycott those they deal with in the marketplace, in order to preserve or improve a member's income and profits. From time to time, adverse contracting practices challenge the industry. Recent examples include internet reverse auction bidding, owner pre-purchasing of equipment and even prefabrication of HVAC equipment. ***Caution is the watch word on addressing these or similar issues.***

MEMBERSHIP POLICIES

Membership policies can also violate the antitrust laws if membership is structured in such as way as to make membership in the trade association an economic necessity. To avoid problems under the antitrust laws it is necessary for the trade association and Industry Improvement Fund to refrain from adopting polices that have the effect of excluding non-member competitors. Trade associations cannot limit membership to only one firm in any given territory or to exclude competitors. Certain limitations, however, are appropriate. For example, a trade association can limit membership based on interests shared by members because of similar products (e.g., auto parts distributors) or similar function (e.g., independent grocers). Geographic limitations are also acceptable if the trade association has considered the actual market and has not arbitrarily excluded

18 2006 WL 3825094 (F.T.C.)
19 2006 WL 322350 (F.T.C.)

competitors. Generally, a membership policy will violate the antitrust laws if competitors cannot survive in the marketplace without membership in the trade association. The same concept applies with respect to the denial of trade association or Industry Improvement Fund services or information to non-members where the denial results in Trade Association's members receiving a significant business advantage. Significant market impact, however, would have to be shown. In most cases, denial of membership, services or information in a local IIF or local MCA chapter would not be a significant market detriment for that firm to compete or work in that area.

An example of economic necessity was demonstrated in Associated Press v. United States,[21] where the government charged the Associated Press ("AP"), an Association of more than 1200 newspapers, with establishing a system of membership by-laws that: (1) prohibited all AP members from selling news to non-members; and (2) granted each member power to block non-member competitors from membership. The Court found that the by-laws, on their face hindered and impeded the growth of competing newspapers. It also concluded that the Trade Association's restrictions on the sale of news to non-members illegally restrained competition because it was practically and financially impossible for a single newspaper to collect and maintain all necessary news stories. Consequently, the Court enjoined the trade association from continuing its restrictive membership practices.

It is appropriate for a trade association or Industry Improvement Fund to charge a different price to non-members for its materials, so long as the price differential reasonably relates to the costs associated with production of the materials. Practically speaking, this means that a trade association cannot set a price differential that is arbitrarily equal to its membership fee. It is within a trade association's discretion, however, to either charge a non-member the pro rata cost of developing and maintaining a service or charge the non-member for costs associated with servicing a new applicant. Such a charge will not constitute a violation of the antitrust laws so long as the fee is not set disproportionately high so as to discourage non-members from utilizing the trade association's or Industry Improvement Fund's materials.

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20 119 F.T.C. 772
21 326 U.S. 1 (1945),

Legitimate public policy debate provides an exemption from per se violations that are not otherwise available in the absence of a public policy objective. For example, advocating for public agency quality-based contractor selection procedures is legally permissible; vowing not to bid when such procedures are adopted, is not legally permissible.

LOBBYING

The Noerr-Pennington Doctrine ("Noerr-Pennington") is an essential antitrust concept. The doctrine provides broad protection from the Sherman Antitrust Act for concerted efforts to influence the decisions of public officials. The protection extends to a trade association's or Industry Improvement Fund's efforts to lobby both the executive and legislative branch as well as to petitions of administrative agencies and the courts.

A trade association or Industry Improvement Fund will enjoy immunity for its petitioning efforts so long as it is not engaging in "sham lobbying." Sham lobbying is that which (1): is objectively baseless in the sense that no reasonable petitioner could reasonably expect success on the merits; and (2) conceals an attempt to interfere directly with the business relationships of a competitor through the use of the governmental process. For example, in In Re Circuit Breaker Litigation,[22] circuit breaker manufacturers ("Manufacturers") filed a lawsuit to restrict the ability of circuit breaker reconditioning companies to compete as well as to cause prospective purchasers to boycott the reconditioning companies' products. Although this may run against intuition, the manufacturers were found to be immune from antitrust liability under the Noerr-Pennington Doctrine.

When reviewing a claim for sham petitioning the Court must apply the two elements of Noerr-Pennington in succession. The Court will examine the litigants' intent only if the lawsuit or petitioning activity is objectively baseless. In the Circuit Breaker case, the Manufactures were able to establish a case for trademark infringement and unfair competition against the reconditioning companies because the companies were taking the original manufacturers' names off the products, reconditioning them and then reissuing the products as their own.

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In the mechanical contracting industry there are numerous examples where the Noerr-Pennington doctrine comes into play. Advocating in the legislature or courts against bid shopping is acceptable, while calling for a boycott against contractors that commit those practices is not acceptable and almost certainly would be a violation of the antitrust laws. Lobbying the legislature or administrative agency for required subcontractor bid listing or best value procurement procedures is not a violation, nor would a request to a public agency to eliminate internet reverse auctions for public contracting. Detailing the risks of owner purchased equipment to that same agency would likewise be acceptable. But calling for collective action against others in the marketplace who do not practice those views would not be protected by the Noerr-Pennington Doctrine and would be a violation of the antitrust laws.

CONCLUSION

Trade associations and Industry Improvement Funds need to be wary of statements that encourage collective actions by members where they otherwise would be competing against each other and making independent business judgements. If a Trustee or Officer makes such statements, he risks automatically being tied to the conspiracy. Moreover, if the Trustee or Officer makes the statement at an association meeting, the association may find itself liable for facilitating the conspiracy by: (1) bringing the conspirators together in one place; and (2) encouraging competitors to act collectively. Even the most casual statement can be tied into subsequent events. Therefore, Industry Improvement Fund Trustees should avoid making any comment or action that encourages or assists member firms to act jointly or to restrict their competition. If the Industry Improvement Fund applies this aforementioned guideline to its work, then it should avoid most entanglements with the Department of Justice and the Federal Trade Commission and its State's enforcement agencies.

TIPS TO AVOID ANTITRUST VIOLATIONS

- **DO NOT** Adopt policies that are intended to exclude, or that have the necessary effect of excluding non-member competitors.
- **DO NOT** Limit membership to only one firm in any given territory or exclude competitors of a member to protect that member.
- **DO NOT** Engage in any collective activity that impacts prices (i.e. lower

INDUSTRY IMPROVEMENT FUNDS AND THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT

The Labor-Management Reporting and Disclosure Act ("LMRDA" or Landrum-Griffen Act) requires employers to file a report annually with the Department of Labor's Office of Labor-Management Standards ("OLMS") if they engage in specific financial transactions or arrangements with a union officer, union agents, shop steward, or union employee or representative (including clerical employees) or labor relations consultant. The Form LM-10 was prescribed by the Secretary of Labor to report such transactions and arrangements, although there is a general exemption if the payment is $250 or less in the aggregate during a single year **and** unrelated to the recipient's role with the union.

The history of Industry Improvement Funds and the LMRDA commences in 1957 with the McClellan Committee, made famous by the fiery debates between Teamsters President James Hoffa and Attorney General Robert Kennedy. The McClellan Committee conducted a highly publicized investigation of union racketeering and corruption; and its findings of financial abuse, mismanagement of union funds, and unethical conduct included:

- Improper financial arrangements between officials of several international and local unions and employers and labor consultants aligned with the employers whose employees were represented by the unions in question or might be organized by them.
- Similar arrangements were also found to exist between union officials and the companies they handled relating to the administration of union employee benefit funds.

Out of the efforts of the McClellan Committee, the Labor Management Reporting and Disclosure Act was passed by Congress in 1959. Interestingly, portions of the Congressional Record were placed directly into the Act and, importantly, stated the following:

> *Congress . . . finds, from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplementary legislation that will afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations, employers, labor relations consultants, and their officers and representatives.*
>
> *LMRDA §2(a), 29 U.S.C. 401(a)*

LMRDA's declared purpose was for unions, employers and their officials to adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations. LMRDA §2(a), 29 U.S.C. §401(a).

In order to legislatively mandate the standards of ethical conduct sought by Congress, the LMRDA integrated provisions aimed at union governance and management including the following:

> "Bill of Rights" for union members including voting rights and freedom of speech and assembly. LMRDA § § 101-105, 29 U.S.C. 411-415.
>
> Financial reporting and disclosure under Forms LM-1- LM-4, LM-30 and LM-10. LMRDA § § 201-206, 29 U.S.C. 431-436.
>
> Procedural, substantive and reporting for union trusteeship. LMRDA § § 301-306, 29 U.S.C. 461-466.
>
> Procedural requirements for the conduct of union elections. LMRDA § § 401-403, 29 U.S.C. 481-483.

Other safeguards for union members included, bonding of union officials, establishment of fiduciary responsibilities for union officials and criminal penalties for violations of the Act including embezzlement and other actions.

Relevant to Industry Improvement Funds is §203 of the LMRDA which provides as follows:

> Every employer who in any fiscal year made—
>
> (1) any payment or loan, direct or indirect, of ***money or other thing of value*** (including reimbursed expenses), or any promise or agreement therefor, to any labor organization or officer, agent, shop steward, or other representative of a labor organization, or employee of any labor organization, except
>
> (A) payments or loans made by any national or State bank, credit union, insurance company, savings and loan association or other credit institution and
>
> (B) payments of the kind referred to in section 186(c) of this title (Section 302(c) of the Labor Management Relations Act of 1947);
>
> . . . shall file with the Secretary a report, in a form prescribed by him, signed by its president and treasurer or corresponding principal officers showing in detail the date and amount of each such payment, loan, promise, agreement, or arrangement and the name, address, and position, if any, in any firm or labor organization of the person to whom it was made and a

> full explanation of the circumstances of all such payments, including the terms of any agreement or understanding pursuant to which they were made.

Original regulations were issued by the Secretary of Labor on May 11, 1960 (25 F.R. 4319), but they merely repeated the statutory requirements and added little to the understanding of the Statute. Regulations were then re-codified and reissued with the Form LM-10 on December 31, 1963 (28 F.R. 14380). With final regulations and the Form LM-10 in place, there nevertheless was little recognition of their importance by employers and very few if any filings were made. Further, the Secretary of Labor made little effort to enforce the filing requirement for many years until 2005.

Although there is speculation surrounding the reasons the OLMS renewed its interest forty years later in the Form LM-10, it revived its efforts and pursued with vigor the enforcement of a statutory tool that had lain fallow. In early 2005, the OLMS conducted an internal audit on LM-30 filings. The Form LM-30 is the companion filing that is done by union officers and certain employees upon the receipt of gifts or payments from employers to those union officers, employees, their spouses or minor children. For the period 2001 to 2004 the OLMS discovered that there were an average of only 61 Form LM-30 filings for 204,634 possible union officials and employees and half of the Forms were not completed correctly.

As a result, the OLMS sent to its Field Offices changes to the LMRDA Interpretive Manual and reiterated the filing requirements under the Act. In making the change to the Interpretive Manual, the OLMS added a new definition of the "de minimis" exemption to the Forms LM-10 and LM-30. The "de minimis" exemption was initially set at $25 if the payment was given by an employer under circumstances unrelated to the recipient's status in a labor organization. On March 31, 2005, the OLMS put a reminder on its website that labor officials had to file LM-30. The notice set July 15, 2005 as the filing deadline for first time filers, which was ultimately extended to August 15, 2005 by notice issued July 8, 2005.

Because of the OLMS' renewed interest about these old disclosure requirements, questions cascaded into its offices. Questions were raised as to who fell into the definition of "Employer" and "Business" who may have given money or reimbursed expenses for labor officials. Did it include the Taft-Hartley employee benefit trusts on which employers and union officials served as trustees?

Did it include the service providers to those employee benefit trusts? The OLMS attempted to respond to those inquiries and issued a series of publications including Trusts and Form LM-30 and Form LM-10 [June 27, 2005] and Filing Form LM-30: An Overview of Union Officer and Employee Reporting [June 29, 2005]. To clarify the filing requirements for Union officials, the OLMS did a major rewrite of the Form LM-30 and related regulations and released them on August 29, 2005. Labor Organization Officer and Employee Reports, Proposed Rules. 29 CFR Part 404, 70 F.R. 51166 [August 29, 2005]. At the same time, the OLMS issued a notice that it was sufficiently overwhelmed with issues regarding Form LM-30, that it would temporarily not seek enforcement of the Form LM-10 and would offer guidance in the near future. On November 9, 2005, the OLMS issued a Form LM-30 Advisory and increased the "de minimis" exemption from $25 to $250.

On November 11, 2005, the OLMS finally issued a Form LM-10 Advisory. It was important to note that the OLMS did not consider its Advisory with regard to the Form LM-10 as new regulations subject to the administrative rule making process. There was, therefore, no opportunity for public comment. This was contrary to the administrative procedures followed on the redraft of the Form LM-30 and related regulations. Additional guidance on the Form LM-10 was issued by the OLMS through its Frequently Asked Questions website in March, 2006 and May, 2006.

COMPLETING THE FORM LM-10

Any employer or any group or association of employers engaged in an industry affecting commerce is required to file the Form LM-10 if there is ***any item of value or reimbursement of expense*** passing from that employer to a union, union official, union employee (including clerical or custodial employees) or agent. Except in rare cases, every private sector business or organization within the United States that has one or more employees is considered an "Employer" under this definition. This would include contractors, trade associations, industry improvement funds, Taft-Hartley employee benefit plans, and service providers to those employee benefit plans.

The OLMS granted a "grace period" to first-time Form LM-10 filers in the Advisory and employers did not have to submit reports or maintain records for fiscal years beginning prior to January 1, 2005, even if such reports should have been filed. To obtain the benefit of the grace period, the employer had to submit the Form LM-10 for 2005 on time and without further direction

from OLMS. The LM-10 for 2005 and all subsequent years must be filed within 90 days after the end of the employer's fiscal year. So, if the employer was a calendar year filer, the report was due March 31, 2006, and March 31st of every year thereafter in which there were reportable events. If the employer was on a fiscal year, such as July 1st to June 30th, its first report was due September 30, 2006. The filing of Form LM-10 would follow the same deadline for each year thereafter.

Additional requirements for the grace period and relief from the obligation for all prior years, included an absence of "extraordinary circumstances" such as

- existence of an ongoing investigation relating to the financial interest,
- egregious conflicts of interest, i.e. violations of §302(a) of the LMRA of 1947, or
- outright attempts to purchase official favors through cash or in-kind payments

If the employer failed to file for fiscal year 2005 or had extraordinary circumstances as defined above, the OLMS would revert to its then policy of reviewing 5 prior years to investigate the employer's actions under the Act.

Form LM-10 has two parts. Part A requires employer identifying information and the location of records necessary to verify the report and type of organization. Part B requires specific information on each reportable activity.[23] The first question asked on Part A, (Item 8a – Type of Reportable Activity Engaged in by Employer) is,

> Did you make or promise or agree to make directly or indirectly, any payment or loan of money or other thing of value (including reimbursed expenses) to any labor organization or to any officer, agent, shop steward, or other representative or employee of any labor organization?

This question is asking the employer if it supplied or reimbursed a union official for meals, lodging, trips, travel, sports tickets, gifts, below market sales, ***basically anything of value***. The disclosure requested of the employer is broader than the Form LM-30 filing requirement because the employer must include transfers of value to any employee, agent, shop steward or representative of the union while those individuals may not have a concurrent filing obligation under Form LM-30. The remainder of the questions under Part A (Items 8b-8f) deal with interference with the right to

23 The latest Form LM-10 and Instructions as of the date of publication are included in the Appendix of this Guide. Updated Forms and Instructions are at the OLMS website www.olms.dol.gov.

organize and the collective bargaining process, and an employer that engages in such activity will have greater legal consequences under the LMRDA, NLRA and LMRA.

Payments made by an employer's employees are imputed to their employer and must be reported if

- the employee holds a key position, like a manager;
- the employee's job responsibilities include maintaining business relationships or engage in labor relations with the union or affiliated employee benefit plans; or
- the employee is acting directly or indirectly for the employer; for example, if the employee could seek reimbursement from the employer but chose not to.

In completing the Form LM-10, if an employer answers YES to any of the questions in Part A, taking into account the applicable exclusions discussed below, the employer must complete all of Part A and complete a separate Part B for each YES answer. Also, if any of the YES answers applies to more than one union official or union, an employer must complete a separate Part B for each one. If an employer is reimbursed by another employer, it is the final payor that reports not the intermediary. If the employer shares an expense, the employers report their pro-rata share.

Both the president and the treasurer, or the corresponding principal officers, of the reporting employer must sign the completed Form LM-10. A report from a sole proprietor that had employees need only bear one signature. LMRDA §203, 29 U.S.C. 433. In the case of a trade association or Industry Improvement Fund, the elected president and treasurer may not have day-to-day involvement and it may be necessary to move the signature authority to a corresponding principal officer, such as the Executive Director. The president and treasurer sign under penalty of perjury and have personal liability for those statements he knows to be false. LMRDA §209(d), 29 U.S.C. §439(d).

Employers must maintain records necessary to verify the accuracy and completeness of their report for at least 5 years after the date the report is filed. The records shall include vouchers, worksheets, receipts and applicable resolutions. LMRDA §206, 29 U.S.C. §436.

All Form LM-10 reports are public information. LMRDA §205, 29 U.S.C. §435. Anyone can view and print LM-10 reports filed by employers for fiscal years on and after 2000 or order copies of reports for fiscal years before 2000 online at the Department of Labor.

EXEMPTIONS FROM THE FILING REQUIREMENTS OF FORM LM-10

(1) LMRA §302(c)

In filing the Form LM-10, an employer should exclude payments covered under LMRA §302(c), such as:

- money paid to employees as compensation, or by reason of, service as an employee (bonus);
- payments in satisfaction of a court or administrative judgment, or in settlement of a dispute (grievance);
- payments with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business;
- payments for money deducted from the wages of employees in payment of union dues; or
- payments to health and welfare fund (including unemployment, life or disability insurance), pension fund, vacation or holiday fund, severance fund, apprenticeship or training fund, scholarship fund, child care fund, legal services fund or Labor-Management Committee.

Other payments that are excluded from the filing requirements for Form LM-10 include:

(i) Payments made in the regular course of business to a class of persons determined without regard to whether they are or are identified with unions and whose relationship to labor organizations is not ordinarily known to or readily ascertainable by the employer;

(ii) Loans made to employees under circumstances and terms unrelated to the employees' status in a union; and

(iii) Sporadic or occasional gifts, gratuities, or favors of insubstantial value, given under circumstances and terms unrelated to the recipients' status in a union (the "de minimis" exemption).

(2) Regular Course of Business

Also excluded are payments on loans, direct or indirect, made in the regular course of business as a national or state bank, credit union, insurance company, savings and loan association or other credit institution.

(3) The "De Minimis" Exemption

The "de minimis" exemption is the most readily available and understood of the exemptions. It is available upon satisfaction of a two part test:

- sporadic or occasional gifts, gratuities, or favors of insubstantial value to a union official which has an aggregate value of $250 or less in a fiscal year; and is
- given under circumstances and terms unrelated to the recipient's status in a union.

OLMS has stated that although numerous gifts would not satisfy the "sporadic or occasional" requirement, it will not enforce that portion of the exemption if the aggregate payment to a union official during a fiscal year is $250 or less.

On the second requirement, OLMS has said that in assessing whether a gift or gratuity is unrelated to union status, the test is whether the employer ordinarily provides such consideration to individuals in similar circumstances who are not union officials. The fact that the union official is there because of his position is not necessarily the relevant inquiry.

An example provided by the OLMS addressing the second test is where an employer routinely provides meals to all its clients (union affiliated or not) during the course of day-long meetings. The meal would be unrelated to union status and would not have to be reported. But if the aggregate of all meals paid or supplied by an employer for a union official exceeds $250 in the course of a fiscal year, the employer would have to report all the meals.

Another common example provided by the OLMS is where a service provider to a pension and welfare plan provided a meal to both union and management trustees, and those types of meals are ordinarily offered to its clients under like circumstances, the meal would be deemed unrelated to the union official's status for the purpose of meeting that part of the "de minimis" test, again subject to the $250 aggregate threshold.

Finally, the OLMS has stated that a business meal between an employer and union official that the employer pays for where only legitimate labor management business is discussed does not have to be reported so long as (1) the employer ordinarily provides this type of consideration to individuals in similar circumstances who are not union officials, (ii) the union official's meal is $250 or less and (iii) the aggregate of all meals with the union official over the course of a fiscal year do not exceed $250.

(4) Parties, Receptions And Widely Attended Gatherings

Another exemption developed by the OLMS applies to widely attended gatherings. A gathering is widely attended if it is expected that a large number of persons will attend and that attendees will include both union officials and a substantial number of individuals with no relationship to a union. For a gathering to qualify as a widely attended gathering, union officials must be treated the same as individuals not affiliated with a union when the employer advertises or distributes invitations for the event. Employers who hold receptions that do not constitute widely attended gatherings must identify and keep records of each attendee who is a union official and include the amount in any Form LM-10 that may be required. When determining whether Form LM-10 is actually required, the Employer should always consider the applicability of the reporting exemptions, including the "de minimis" exemption. The widely attended gathering exemption has two available avenues.

(a) ***$20 exemption for widely attended gatherings*** **--** If an event is a widely attended gathering, the employer may take advantage of a $20 recordkeeping and reporting exemption. Thus, if an employer holds a widely attended gathering and spends $20 or less per attendee, it has no Form LM-10 obligations with regard to tracking or disclosing these costs. By way of example, if a union official attends four widely attended gatherings hosted by a single employer costing $20 or less, and in the same fiscal year receives $300 worth of sporting tickets from the same employer, the employer would be required to report only the $300 tickets. On the other hand, if the benefit conferred on each individual exceeds $20 and the $125 exemption discussed below is not applicable, the employer must identify and keep records of each attendee who is a union official. At the end of the fiscal year, the employer should determine whether a Form LM-10 must be filed based on payments to the union attendees after considering the applicability of the reporting exemptions, including the "de minimis" exemption.

(b) ***$125 exemption for one or two widely attended gatherings*** – For one or two widely attended gatherings in a single fiscal year, an employer may take advantage of a $125 recordkeeping and reporting exemption. If an employer holds one or two widely attended gatherings and spends $125 or less per attendee per gathering, it has no Form LM-10 obligation with regard to tracking or disclosing these costs. Specifically, this exemption is available for any widely attended gathering where the Employer has not previously held, in the same fiscal year, more than one prior gathering costing more than $20 per attendee, at which the same union official or officials are in attendance. In other words, an employer may hold one widely attended gathering attended by a group of Union officials costing at $125 per attendee without incurring a Form LM-10 filing obligation.

COMMON ISSUES INVOLVING FORM LM-10

In addition to the general requirements for filing the Form LM-10 and the exemptions, the OLMS has addressed many issues common to the mechanical contracting industry regarding the Form. Many of these issues have been asked and answered through the OLMS website, Employer Reports – Frequently Asked Questions at the Department of Labor.

The OLMS also maintains interactive communications with regard to the reporting obligations and if there is a particular question that has not been asked and answered, you can email the OLMS *(click for link)* at and a prompt reply will be provided. The response, however, will not constitute an official position of the OLMS or the U.S. Department of Labor and is not to be construed as legal advice. Some of the common issues that have been tackled are as follows:

(1) Must every payment from every employer to any union officer be reported? No, generally payments from only the following employers are reportable:

(a) An employer whose employees the recipient's labor organization represents or is actively seeking to represent.
(b) An employer a substantial part of which consists of buying from, or selling or leasing directly or indirectly to, or otherwise dealing with an employer whose employees the recipient's labor organization represents or is actively seeking to represent;

(c) An employer that buys from, or sells or leases directly or indirectly to, or otherwise deals with the recipient's labor organization;
(d) An employer that buys from, or sells or leases directly or indirectly to, or otherwise deals with a trust in which the recipient's labor organization is interested; or
(e) An employer in active and direct competition with an employer described in paragraphs 1 though 4.

Thus, for example, payments to a union official from an employer actively seeking to establish a business relationship with the official's union, or an affiliated pension and welfare plan, would be reportable. A law firm that is on, or actively vying to be included on, a union's list of "designated legal counsel" and thus be recommended by the union to the union members, is another example of an employer whose covered payments must be included on Form LM-10. The act of making a payment (or giving something of value) to a union or union official may be an indication that the employer is actively competing for union or trust business. On the other hand, for example, a payment from an investment firm to a client who is a union official will not be reportable unless the investment firm is described in one of the paragraphs listed above in 1 though 5.

(2) Unions are often affiliated with trusts, such as pension and welfare plans. Union officers frequently serve as trustees to these trusts. Are service providers to trusts, such as broker-dealers, investment advisors, investment companies, and investment banks, required to file a Form LM-10?

Yes, if a service provider to a trust has one or more employees and makes a payment to a union or a union official that is not subject to a specific reporting exemption, the service provider must file a Form LM-10. For example, if an investment management firm offers a union official the use of a vacation home or paid travel and lodging in an effort to establish a business relationship between the firm and a pension plan for which the union official is a trustee, the firm would be required to file a report disclosing the gift.

(3) An employer pays a labor organization $1,000 for a full-page advertisement in a commemorative booklet that is given to all of the officers of local unions attending a union conference. The same employer also pays $2,000 to conduct marketing activities from a trade booth at the conference. Are these payments reportable on Form LM-10?

Yes. The employer must file a Form LM-10 reporting the $1,000 paid for the advertisement in the commemorative booklet, and the $2,000 for the conference trade booth.

Under section 203(a), and subject to multiple exceptions, employers must report payments to labor organizations and their officials. 29 U.S.C. § 433(a)(1). Section 203(a)(1)(B) exempts payments of the kind referred to in section 302(c) of the Labor Management Relations Act (LMRA). 29 U.S.C. § 433(a)(1)(B). Section 302(c) covers payments "with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business." 29 U.S.C. § 186(c)(3). The purchase of "advertising" in a journal or use of a booth might be considered to be comparable to the purchase of an "article or commodity" within the meaning of the exception set forth in section 302(c)(3) of the LMRA, but the transactions, by all appearances, are not made in the "regular course of business." Unions are not in the business of producing and selling periodicals for advertising revenue or hosting trade shows. Thus, the payment is not in the regular course of business. In addition, the purpose of a commemorative journal is to raise funds for the union, and purchasers of space do so, at least in part, to support the union, and not merely for advertising purposes. Thus, there is no reliable way to assess a "prevailing market price" for journal entries or rental of a booth at a union conference; therefore this exemption is not applicable. (FAQ Question 31(A)).

(4) Must an employer file a Form LM-10 for donations to a union scholarship fund?

No. Ordinarily the scholarship fund will meet the conditions set forth in section 302(c)(5) and (7) of the Labor Management Relations Act, and the payments will not be reportable. See 29 U.S.C. 433(a)(1). The LMRDA contains an exception for payments of the kind referred to in this section of the Labor Management Relations Act. If the fund does not meet these conditions, the payments are considered to be payments to a union or union official and must be reported. (FAQ Question 32).

(5) Are payments from an employer to a tax exempt organization reportable on Form LM-10?

Payments made by an employer to a tax exempt organization are generally not reportable on Form LM-10, as they are not payments made to a labor organization. An organization, including a tax

exempt organization, is not a labor organization unless it meets the LMRDA definition of a "labor organization.". The Act provides as follows:

> "Labor organization" means a labor organization engaged in an industry affecting commerce and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization, other than a State or local central body. 29 U.S.C. § 402(i).

If the organization does not meet this definition, it is not a labor organization, and payments to it are generally not reportable. Two exceptions to this rule follow.

> *Indirect payments*. Under highly unusual circumstances, payment to a tax-exempt organization may be considered an indirect payment to a labor union or labor union official. Payments to a charity created to fraudulently enrich the union officials that chartered it, for example, or to provide educational scholarships to their own children, would be reportable. On the other hand, the mere fact that a union official sits on the board of the charity would not in itself make the payment reportable.

> *Tax exempt funds that constitute union funds*. Payments made to a tax exempt organization are reportable on Form LM-10 if the union manages the organization's assets and controls its expenditures. For example, payments from employers to a tax-exempt union relief fund, would be reportable if the union manages its assets and controls its expenditures. For further example, payments to a union-sponsored PAC would be reportable if the union manages the PAC's assets and controls its expenditures, as these payments are made to a union. 29 U.S.C. § 433.

[Ed.-The OLMS has also advised by separate inquiry that payments to Union "entertainment funds" or "entertainment committees" used for union sponsored events such as picnics, dinner dances, golf outings and retiree functions are reportable on Form LM-10. Payments, even to a segregated fund, in which the union manages its assets and controls its expenditures must appear on Form LM-10.]

(6) Is a Form LM-10 required if an employer makes a contribution to a union officer or employee who is a candidate for public office? Must the union officer or employee who receives the contribution file a Form LM-30?

Yes. Such contributions are reportable, unless the de minimis or another exemption is applicable. Even if the payments are made to a separate campaign fund for the individual, the payments are reportable as an "indirect" payment to a union official.

(7) Union employees who perform exclusively clerical or custodial services are not required to report employer payments on the Form LM-30. Must payments to such employees be reported on Form LM-10?

Yes. The payments are reportable if they are not within the $250 de minimis exemption or another reporting exemption. There is no statutory exclusion for payments by an employer to a union clerical or custodial employee. Section 203(a)(1) requires employers to report "any payment or loan, direct or indirect, of money or other thing of value (including reimbursed expenses), or any promise or agreement therefor" to "any labor organization or officer, agent, shop steward, or other representative of a labor organization, or employee of any labor organization." No exceptions to the Form LM-10 reporting requirements are made based on the type of work performed by the union employee receiving the payment, loan, or other thing of value.

(8) Is a meal purchased by an investment manager for the spouse of a union officer required to be reported on a Form LM-10 by the investment manager?

No. Under section 203(a), an employer must report payments and loans, direct or indirect, and other things of value, only when made to "any labor organization or officer, agent, shop steward, or other

representative of a labor organization, or employee of any labor organization." 29 U.S.C. 433. Thus, ordinarily, a payment to a union officer's spouse would not be reportable.

Under unusual circumstances, however, a payment to a union officer's spouse may be considered an "indirect" payment to the union officer. The circumstances may include the reasons for the payment, the relationship, existing or potential, between the payer and the union officer's spouse, and the relationship, existing or potential, between the payer and the union officer, the union, or a trust, such as a pension or welfare plan, in which the union is interested. For example, if an employer provides two Super Bowl tickets to a spouse of a union official several weeks before a collective bargaining agreement between the employer and the official's union is to be negotiated, and the employer has no meaningful, independent relationship with the spouse, the tickets are reportable on Form LM-10. Similarly, if a service provider to a union's pension plan provides an official's spouse with a luxury watch, and the employer has no meaningful, independent relationship with the spouse, the watch is reportable on Form LM-10. On the other hand, if a service provider to a union's pension plan takes all plan trustees and their spouses to a meal and concert, the payments for the spouses would not be reportable. Note, however, a union official who is also either a union officer or a union employee is subject to the Form LM-30 reporting requirements, which mandate reports of payments received by union officers and employees as well as their spouses.

(9) Payments made by employers to union officials and union-appointed trustees of pension and welfare plans as marketing expenses are generally deductible under the Internal Revenue Code. Are they also exempt from reporting on the Form LM-10?

No. Business development and client relations expenditures by employers for marketing are not exempt from reporting.

Section 203(a) of the LMRDA requires employers to report certain payments to labor organizations and their officials, subject to multiple exceptions. 29 U.S.C. § 433. One of these exceptions exempts employers from disclosing "payments of the kind referred to in section 302(c)" of the Labor Management Relations Act. Section 302(c) excludes, among other things, payments "with respect to

the sale or purchase of an article or commodity at the prevailing market price in the regular course of business." 29 U.S.C. § 186(c).

Payments for the purpose of cultivating or maintaining a business relationship are ancillary to the employers' regular course of business. Further, in most cases, the gift or gratuity, such as a golf outing, does not constitute an "article or commodity." In addition, and for obvious reasons, the gift or gratuity is not provided at a prevailing market price. Finally, workers have an interest in knowing whether union or pension and welfare plan business decisions are being made solely in the best interests of the union or the plan, without regard to any personal benefits received by the union official. At the same time, the $250 de minimis threshold helps to ensure that employers are not burdened with reporting routine transactions of little interest to union members. (FAQ Question 46).

(10) If an employer paid amounts that are otherwise reportable on a Form LM-10 but which are subsequently repaid by the recipient within the same year, must those amounts be reported on a Form LM-10?

No. Employers need not report gifts that are rejected and returned and payments that are repaid by the recipient. The same rule applies to hospitality items, such as meals, beverages, vacations, etc. The items are not reportable when reimbursement is made. The recipient must reimburse the employer for the gift, payment, or hospitality in the same fiscal year in which it was received. If the payment is made near the end of the fiscal year, however, the employer need not file a report if it is reimbursed promptly, even if the reimbursement occurs in the next fiscal year. Where timely reimbursement is not made, the payment must be reported, although the filer may note that reimbursement was made.

Cash payments not promptly reimbursed must include interest, or the forgone interest will be reportable as a gift. Similarly, a gift of a car or a boat, for example, must be returned with compensation for their use at the fair market rate and any diminution in value or the forgone compensation must be reported as a gift.

In particular cases concerning serious conflicts of interest or attempts by employers to circumvent or evade the filing requirements, the Department may, by specific request, require reports of payments and gifts, etc., despite return or reimbursement. For example, a series of numerous, high-value payments made by an employer to a union official must be reported even where each payment is promptly reimbursed, to avoid the nondisclosure of the substantial value that is conferred on an individual who has even short-term use of very large amounts of money.

(11) If an employer has to report a payment, does that mean the employer has committed a crime?

No, although some payments from employers to unions and union officials may constitute a crime, not all such payments do. Willful violations of section 302(a) and (b) of the Labor Management Relations Act are subject to criminal prosecution only by the Department of Justice, not the Department of Labor. 29 U.S.C. § 186(a), (b) and (d). Section 302(c) of the Labor Management Relations Act, 29 U.S.C. § 186(c), contains a list of payments that are exceptions from the prohibition in subsections (a) and (b) and therefore are not violations of the statute and not subject to criminal prosecution. 29 U.S.C. § 186(c)(1-9).

This guidance at times discusses the language of section 302(c) of the Labor Management Relations Act, 29 U.S.C. § 186(c), because "payments of the kind referred to in section 302(c)" need not be reported on the Form LM-10. 29 U.S.C. § 433(a)(1)(B). When concluding that a payment is reportable, the guidance does not interpret the provisions of section 302(c), and conclusions reached by the Department regarding payments of the kind referred to in section 302(c) would not bind the Department of Justice in carrying out its criminal enforcement responsibilities.

CIVIL AND CRIMINAL PENALTIES ASSOCIATED WITH FORM LM-10

The fact that a particular financial transaction or interest is or is not required to be reported on Form LM-10 is not indicative of whether it is or is not subject to any legal prohibition; this must be tested by other provisions of the law.

The LMRDA is an Act of disclosure. In the Senate Report it states that disclosure discourages questionable practices; "the search light of publicity is a strong deterrent." Also, disclosure aids union governance reporting, and publication will enable unions to better regulate their own affairs. The members may vote out of office any individual whose personal financial interests conflict with his duties to members. Finally, disclosure creates a permanent public record.

Under the LMRDA, the Secretary of Labor may bring a civil action in federal district court for such relief (including injunction) as may be appropriate to enforce compliance with LMRDA reporting and disclosure requirements. LMRDA §210, 29 U.S.C. §440. The LMRDA prescribes criminal penalties against a person—fines of not more than $10,000 or imprisonment for not more than one year, or both—for a willful violation of the reporting or disclosure requirements. Id.

The criminal penalties would apply if the employer filed a Form LM-10 with a false statement or representation of a material fact, knowing it to be false, or a knowing failure to disclose a material fact; and a willful false entry in or willful concealment, withholding or destruction of any books, records, reports, or statements required to be kept by any provision of the reporting and disclosure requirements of the LMRDA. The individual required to sign a Form LM-10 on behalf of an employer is personally responsible for the filing and for any statement contained in the LM-10 that he or she knows to be false. LMRDA §209, 29 U.S.C. §439.

The information that must be disclosed on a Form LM-10 may indicate violations of other federal laws including the Labor-Management Relations Act (LMRA). Section 302(a) of the LMRA prohibits all payments and loans (and agreements for payments and loans) from employers and persons acting in the interest of employers to any labor organization, or any officer or employee of a labor organization, which represents or seeks to represent, or would admit to membership, any of the employees of the employer, unless such payment is specifically excepted under LMRA §302(c). LMRA §302(b) generally prohibits a labor union or its representatives from requesting or receiving

money or other things of value from employers whose employees are represented by the union or who would be admitted as members of the union.

With respect to Form LM-10 reporting, the relevance of LMRA §302(a) and (b) is apparent; a transaction that violates §302(a) is reportable under Form LM-10. LMRA §302(a) and (b), 29 U.S.C. §186(a) and (b). LMRA §302(d) sets forth the criminal penalties for violations of either §302(a) or (b). Generally, if the unlawful transaction does not exceed $1,000, the crime is a misdemeanor; however, if the unlawful transaction exceeds $1,000, the crime is a felony. ***Importantly, the transaction need only be willful*** without ***specific intent***, meaning that the employer need ***only realize that it is making payment to a union official*** and ***not that it is specifically violating the LMRA with an intent to influence that official. LMRA §302(d)(2).***

The enforcement agent for the LMRA is the U.S. Department of Justice and not the Department of Labor. Reported cases under §302 have typically involved serious violations, containing 100 different counts in the indictment including bribery, extortion, cash payments for labor peace on jobs (protection), interference with collective bargaining and the right to organize. Some of the items that have changed hands have been substantial and generally include cash but also meals, Super Bowl tickets, TV sets, under market sales of goods, free services, cruises, hotels, Yankee tickets.

The reporting on Form LM-10 could arguably also indicate a potential prohibited transaction under ERISA §406(b)(3). ERISA §406(b)(3) provides that a fiduciary with respect to a plan shall not receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

This provision of ERISA may be relevant in those instances where a Trustee of an ERISA-covered trust in which a union is interested is also an officer or employee of that union. If a service provider of the plan provides that trustee with something of value, a dinner or golf-outing that does not satisfy the de minimis exemption, OLMS takes the position that the transaction should be reported by the service provider on the service provider's LM-10 and by the Trustee on an LM-30. ERISA §406(b)(3), 29 U.S.C. §1106(b)(3).

On August 4, 2008, the Department of Labor's (DOL) Employee Benefits Security Administration (EBSA) issued an update to its *Enforcement Manual (Manual)* that has helped to clarify the issue on ERISA §406(b)(3). The *Manual* was updated at Chapter 48, *Fiduciary Investigations Program*, available online at: http://www.dol.gov/ebsa/oemanual/cha48.html. The full text of the *Manual* is available at: http://www.dol.gov/ebsa/OEManual/main.html.

The update added a new paragraph 12, addressing the receipt by a plan fiduciary (Trustee) of meals, gifts, entertainment and the reimbursement of expenses associated with educational conferences in the context of ERISA §406(b)(3)'s prohibited transaction rules:

12. **Fiduciary Violations Involving Gifts and Gratuities.** Investigations may disclose possible fiduciary violations involving a plan fiduciary's acceptance, from a party dealing with the plan, of consideration such as meals, gifts, entertainment, or expenses associated with educational conferences. In such cases, the Investigator/Auditor should determine whether the facts support an allegation that the receipt of gifts, gratuities, or other consideration were for the fiduciary's personal account and received in connection with a transaction or transactions involving the assets of the plan as required for a violation of ERISA §406(b)(3). The Investigator/Auditor should also determine whether the fiduciary or the plan maintained a reasonable written policy or plan provision governing the receipt of items or services from parties dealing with the plan and whether the fiduciary adhered to that policy.

    Further, for enforcement purposes only, the Investigator/Auditor generally should adhere to the following guidelines:

    (1) The Investigator/Auditor should treat as insubstantial, and not as an apparent violation of ERISA §406(b)(3), the receipt by a fiduciary (including his or her relatives) of the following items or services from any one individual or entity (including any employee, affiliate, or other related party) as long as their aggregate annual value is less than $250 and their receipt does not violate any plan policy or

provision:

a. gifts, gratuities, meals, entertainment, or other consideration (other than cash or cash equivalents) and
b. reimbursement of expenses associated with educational conferences.

(2) The Investigator/Auditor should not treat the reimbursement to a plan of expenses associated with a plan representative's attendance at an educational conference as a violation of ERISA §406(b)

(3) if a plan fiduciary reasonably determined, in advance and without regard to whether such expenses will be reimbursed, that

a. the plan's payment of educational expenses in the first instance was prudent,
b. the expenses were consistent with a written plan policy or provision designed to prevent abuse,
c. the conference had a reasonable relationship to the duties of the attending plan representative, and
d. the expenses for attendance were reasonable in light of the benefits afforded to the plan by such attendance and unlikely to compromise the plan representative's ability to carry out his or her duties faithfully in accordance with ERISA. The fiduciary's determination should be in writing.

For actions that are particularly egregious, there may even be a criminal violation under 18 U.S.C. §1954. §1954 applies to the offer, solicitation, acceptance or receipt of things of value because of or with the intent to be influenced with respect to the operation of an ERISA-covered plan. §1954 is intended to reach a broad class of persons who are connected with the operation of employee benefit plans. This criminal statute may be relevant in those instances where a Trustee is also an officer or employee of a union. Transactions that arguably may constitute a criminal violation under §1954 involving union trustees of an ERISA plan may be reportable on the Trustee's LM-30, which may raise certain 5th Amendment issues. 18 U.S.C. §1954.

CHAPTER V – PROGRAMS AND SERVICES

EDUCATION

Industry Improvement Funds exist primarily to provide programs and services. These may vary as widely as the Trust Agreement permits. A discussion of major types of activities follows, but this does not suggest that Industry Improvement Funds are to be limited only to these categories.

Of all the services performed by Industry Improvement Funds, educational programs are the most rewarding and according to many the most important. The complexity of today's construction practices requires that in every category of the industry there be continuing education. This applies to the journeyman, estimator, draftsman, foreman, middle manager and top executive. The important function of IIFs is to provide special courses designed to meet the latest challenge to management as well as to the specialist. Basic education in production craft skills is, of course, the responsibility of the apprenticeship programs sponsored by contractors and the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada.

Industry Improvement Funds are used for both formal and informal education. Types of formal education include scholarships, independent courses of study, and establishment of degrees in "Mechanical Contracting" at accredited colleges. Scholarships take many forms. Some are used to recruit young people into the industry and mandate a course of study that is industry-related. Others are benevolent scholarships for the talented but underprivileged.

Some Industry Improvement Funds have established independent courses of study programs, whereby industry personnel and others may enroll in nearby colleges and take job-related courses. In this instance, the student may be reimbursed the cost of the course on a sliding scale basis according to his grade upon completion. At least several accredited colleges now offer degrees in "Mechanical Contracting," which were funded by Industry Improvement Funds. Mechanical contractors also assisted in developing the curriculum and even taught relevant courses.

Informal education covers, but is not limited to, management seminars, supervisory training, skill improvement, estimating, drafting, safety programs, in-house staff education and corollary programs dealing with such subjects as safety, pension or equal employment opportunity laws.

Reduced cost or no cost to Industry Improvement Fund contributors is a definite benefit and inducement for contractor participation.

INDUSTRY PROMOTION

A good public relations program is a necessity for the effective operation of an Industry Improvement Fund. The purpose of public relations is to achieve public understanding and acceptance for an industry or its organizations. It is a continuous task. Good public relations occur when an IIF becomes the official voice of the industry to the community with which it is most vitally concerned. Budget permitting, retaining a public relations firm is a good investment. Adverse publicity can be addressed quickly and positive developments will get coverage. Advertisements in various media require professional preparation. Selling the advantages of a ready reserve of manpower with skill and training to deliver the job on time and promoting the expertise of mechanical contractors themselves to those contracting for construction is an ongoing job. The Industry Improvement Fund can maintain an invaluable direct line to the editor of the local newspaper or television station. **Any advertising or promotion by an Industry Improvement Fund must be on an industry-wide basis. Avoid any advertising or promotion that promotes particular contractors by name. If names of any member companies are listed, then all must be included.**

COMMUNICATIONS AND PUBLICATIONS

The Industry Improvement Fund office acts as a clearing house for information. A publication released on a regular basis is the best means of disseminating this information and helps to establish identity of the IIF and the industry it serves. These publications may range from simple newsletters distributed only to contributors, to polished publications used as selling tools to users of industry services.

Aside from the publications previously mentioned, there are a variety of other publications that may be considered such as directories of governmental and inspection personnel and statistical

compilations. "How-to" user's aids and skill improvement booklets for employees are often provided. Manuals concerning safety and other topics also are often published.

RESEARCH

An important activity for Industry Improvement Funds is to survey industry needs, covering a wide range of matters. Manpower demand, compensation of in-house personnel, insurance ratings, product cost and productivity studies, for example, are examined, and the results made available to those concerned. Studies of codes, materials, energy needs, water supply, and treatment facilities may be undertaken. Contributions to other groups involved in programs within the scope of the fund's purposes, such as the American Society of Heating, Refrigeration and Air Conditioning Engineers and the Mechanical Contracting Foundation, may be made. Green/sustainable construction trends, technology such as BIM and public and private contracting practices should be considered as well.

INDUSTRY AND COMMUNITY RELATIONS

Industry relations are probably the most important "relation" that an Industry Improvement Fund can develop for a direct benefit to industry served by an IIF. Participating in a council of Associated General Contractors, National Electrical Contractors Association, Sheet Metal and Air Conditioning Contractors National Association, American Institute of Architects, engineering societies, and others, affords the opportunity to make the industry position known and to gain insight into the position of these allied groups.

EEO community relations activities present affirmative action opportunities to increase minority participation in the industry. Working with the Industry Improvement Fund gives an opportunity for input into community development and needs.

GOVERNMENTAL RELATIONS

Often the mechanical contracting industry will seek legislation to improve the working climate and the services delivered. At other times it may be necessary to oppose legislation and regulations detrimental to the industry. It is, therefore, important to stay abreast of legislation and regulatory trends and maintain contacts with the federal, state and local governments. Often forums such as dinners are set up in order to become more aware of issues affecting the industry. Government appreciation dinners to which city, state and/or federal officials are invited, are often sponsored. These offer an opportunity to become better acquainted and to act as sounding boards.

A "balanced" governmental affairs committee, composed of representatives of all political parties among contributing contractors may be established. The committee should review and consider legislation from the federal to the local level. An active committee will let politicians know that the industry is organized. This should benefit the industry, whether legislation finally passed is positive or negative. Also, industry interests should take precedence over all partisan political concerns. So, the impact on the industry should be without partisan considerations.

The committee also should maintain a liaison with those state and local agencies that have an impact on the industry. This is essential in view of the ever increasing regulatory expansion which places far-reaching requirements, restrictions and hardships on virtually every phase of contractors' operations.

Areas of Particular Importance for Government Affairs Committees Under IIFs:

- ***Codes*** - The Industry Improvement Fund can provide an outstanding service by taking an active part in code adoption, revision and administration. As a minimum, a bulletin service to the contractors advising of any changes, interpretations, etc., is of the utmost importance.
- ***License Laws*** - Twenty-eight states now have a state law requiring the licensing of all contractors. In other states licensing is normally required by counties and municipalities. The Industry Improvement Fund can be of service by helping to enforce these laws for the protection of the public and the mechanical industry.
- ***Industry Regulations*** - The federal and state laws governing Equal Employment Opportunity (EEO), Affirmative Action (AA), Occupational Safety and Health Association (OSHA), Family Medical Leave (FMLA) and Americans with Disabilities Act (ADA), are a continuous concern to industry members. An information service on these major subjects as well as other regulations affecting the industry is essential. Seminars on these subjects are very beneficial.

Governmental relations, however, that constitutes "lobbying," as defined under the Internal Revenue Code does impact the deductibility of a contributor's funds as ordinary and necessary business expenses. The Internal Revenue Code does not allow Industry Improvement Fund contributors to deduct that portion of their contributions that are allocable to "lobbying". See Chapter 3.

Care must also be taken in these efforts as many states have taken aggressive steps through statute, regulation or executive order to put an end to "pay to play." Any payments, direct or indirect, may result in contractors being declared ineligible to bid on public jobs. In operating a successful governmental relations program multiple issues need to be analyzed including federal and state laws regarding lobbying, registration and disclosure filings and "pay to play" restrictions.

RECRUITING

Industry Improvement Funds may also assist when there is a need to recruit new people into the industry. A variety of approaches are used. During career day programs in high schools, talks are given to young people who do not intend to pursue further formal education to interest them in the apprenticeship program. Those going on to college are encouraged to major in areas that will prepare them for later entry into the mechanical contracting industry. In some instances, scholarships previously discussed are used as an incentive. The continuing efforts to attract minority groups into the industry are approached in the same manner, often with fund or industry representatives going to the high schools and trade schools.

The utilization of the internet also cannot be overlooked. Current generations have moved at a dramatic rate away from print media and now obtain all their information electronically. As electronic media (TV, radio, cell, internet) meld, an IIF will have to analyze how best to use all those outlets as another recruitment tool.

RELATED AGENCIES

The National Certified Pipe Welding Bureau (NCPWB) is important to mechanical contractors. By providing mobility for certified welders and establishing recognized credentials and the method and procedures for certification, a service is provided that is critical to mechanical contractors. Support of local chapters of the NCPWB is often undertaken with Industry Improvement Funds.

The National Environmental Balancing Bureau (NEBB) and the Mechanical Service Contractors of America (MSCA) local chapters, are often supported in the same manner.

SECURITY AND JOB SAFETY

With the erratic changes in the cost of building materials (copper and other metals, for instance) and the escalating cost and sophistication of construction equipment and tools, security is important. Security programs often consist of educational and investigative services. Usually job signs and decals are provided to encourage individuals to report knowledge of losses. Development and presentation of first aid and OSHA safety programs are useful in preventing and minimizing job injuries that do occur. Often the local Red Cross, OSHA regional offices and local law enforcement will assist in these programs.

SPECIAL EVENTS

Banquets and awards in recognition of outstanding industry individuals and achievements are frequently sponsored. They may honor a general contractor or a mechanical contractor or others. Often, a project is singled out for recognition either in its entirety or for its mechanical installation. Booths at industry or home shows are sometimes manned.

Ceremonies that honor students upon completion of supervisory training or other informal or formal educational programs of the industry, may be sponsored. Annual industry outings, involving personnel in all segments of the industry, can be an effective means of communication.

SUMMARY

The foregoing are some programs and services that may be provided by Industry Improvement Funds. Countless others have not been mentioned. One basic rule should be considered in the development of these programs and services: they should provide collectively better programs than are feasible on an individual firm basis and advance the purposes of the mechanical contracting industry.

CHAPTER VI – FREQUENTLY ASKED QUESTIONS

Q1. *Can an IIF pay the MCAA national dues for local MCA Chapter members?*

A-1. Because contributions into an Industry Improvement Fund are typically from a greater number of contractors than are members of the local MCA Chapter or MCAA, utilization of Industry Improvement Fund assets might violate the fiduciary responsibility of the Fund to utilize its assets for the benefit of all members of the industry and not just some members if membership were not available to all. Providing a benefit to particular members of the affiliated trade association would go to qualification of the Industry Improvement Fund under Internal Revenue §501(c)(6). It is therefore recommended that local MCA Chapter dues always be sufficient to cover both the local dues and MCAA dues for all contributors. Legal counsel is recommended on these dues issues in specific cases.

Q2. *Can an IIF pay the union for expenses related to an educational seminar that benefits collectively bargained employees?*

A-2. Payment directly from an Industry Improvement Fund to a union raises a possible violation of §302 of the LMRA. Certainly, reimbursement for an appropriate and documented shared expense such as the cost of organizing and presenting a joint educational seminar would not violate the prohibitions of §302. It, however, is a better procedure in a joint educational or marketing effort, that the expense be paid equally or on a pro rata basis by each of the parties directly to the vendor and there not be a flow of dollars between or among the union, Industry Improvement Fund or trade association.

Q3. *Can an IIF pay the Union for an organizer to expand market share?*

A-3. No. As stated above, payments from an Industry Improvement Fund directly to a union raises the question of whether there has been a violation §302 of LMRA. Further, the purposes of an Industry Improvement Fund are not related to the hiring of union personnel but rather for programs in support of the contributing contractors. There are other avenues more in line with Industry Improvement Fund purposes to facilitate the increase of market share.

Q4. *Can an IIF share expenses with the union for mutually beneficial programs?*

A-4. Yes, as noted above there are multiple opportunities for the union and Industry Improvement Fund to advance the mechanical contracting industry. Outside of the collective bargaining process, the long-term interests of both parties are intertwined. It is, therefore, suggested that common programs jointly sponsored by a local union and local MCA Chapter and Industry Improvement Fund should be shared whereby each party pays its pro rata share directly to the provider of those services. For instance, if a marketing program is developed and an outside firm is hired with appropriate experience and expertise, that service provider should be paid on a pro rata basis by all of the contractual parties. The Industry Improvement Fund should not be the sole contractual party and seek reimbursement from the other concerned entities.

Q5. *Can an IIF pay for drug testing required by Owners for collectively bargained employees?*

A-5. Yes, according to PWBA (now EBSA) Advisory Opinion 97-08A (1980), an Industry Improvement Fund may pay for drug testing so long as there are no services rendered beyond the testing. Providing additional services such as referrals to in-patient or out-patient drug and rehabilitation services or paying for those services or other counseling will endanger the fund of being classified as a employee benefit welfare plan covered by the Employee Retirement Income Security Act of 1974 (ERISA) and are to be avoided.

Q6. *Can an IIF make contributions to a political campaign?*

A-6. No, It is not recommended that political contributions be made through an Industry Improvement Fund. Although sporadic or infrequent contributions from an IIF to a political campaign will not endanger its tax exempt status, the greater concern is the requirements of federal election law and state election law. Based upon the amount of the contribution and to whom the contribution is made (a federal or state political campaign) there are specific disclosure requirements that are applicable and possibly registration procedures that would have to be satisfied. If it is in the best interest of the mechanical contracting industry in your state to become politically involved, it is recommended that a duly qualified federal political action committee or state political committee be properly formed, registered and all necessary filings observed. These entities, separate and apart from the Industry Improvement Fund, are acknowledged and recognized entities for the purpose of making political contributions and are the appropriate vehicle for that purpose.

Q7. *Can an IIF make charitable contributions to an organization qualified under IRC §501(c)(3)?*

A-7. Yes, making charitable contributions through an Industry Improvement Fund will not endanger its tax exempt status under federal or state law. It, however, must be recognized that an Industry Improvement Fund is not created to support charitable organizations but is formed to provide programs and support for the contributing contractors in the mechanical contracting industry. Charitable contributions should be done on a sporadic basis and most appropriately to a charitable cause related to the mechanical contracting industry.

Q8. *Can you still carry a union card and sit on the Board of Trustees or be an Officer of an Industry Improvement Fund?*

A-8. Yes, the mere fact that an individual happens to maintain their union membership after they have ceased working with the tools and have become an Employer and contributor into the local Industry Improvement Fund would not prohibit them from serving as an Officer or Trustee of the IIF. However, active union officials may not serve on the IIF.

Q9. *What is the liability of Trustees on an Industry Improvement Fund?*

A-9. Although Officers and Trustees of an IIF are held to the status of a fiduciary because they are responsible for the assets of another (i.e., contributing contractors) they typically are only held personally liable for acts that are willful, grossly negligent and not in the best interest of the Industry Improvement Fund. The controlling documents for the Industry Improvement Fund should provide, as allowed under state law, that an Officer or Trustee will be indemnified for any of their acts taken in good faith and in the best interest of the IIF. Further, appropriate directors and officers and public liability insurance should be in place at all times. Finally, for simple acts of negligence, the federal Volunteer Protection Act has provided that, subject to certain exceptions, an Officer or Trustee of a non-profit corporation cannot be held liable for compensatory or punitive damages.

Q10. *If the union that you collectively bargain with, decides that they do not want an Industry Improvement Fund in the Agreement, is there any way that they can block it?*

A-10. Yes. As a permissive subject of bargaining, an employer cannot bargain to impasse with the local union over the inclusion of an Industry Improvement Fund in the collective bargaining agreement. So, if the inclusion of the Industry Improvement Fund is the remaining item left to be bargained between the parties, the employer cannot refuse to enter into the agreement for the mere failure to include the IIF. At the same time, however, there may be items which the union has sought to bargain over that are not required by federal labor law, such as foremen who are representatives of the employers and not part of the bargaining unit or check off for union dues. If necessary, there can be a

trade off between an employer's refusal to bargain over foremen or check off and the union's decision not to bargain over the Industry Improvement Fund, that may eliminate the impediment to the inclusion of an Industry Improvement Fund.

Q11. *If you have a national contractor that doesn't want to pay Industry Improvement Funds, what can you do to force them to pay into it?*

A-11. Very little. See the National Electrical Contractors Association, Inc. v. National Constructors Association.National Electrical Contractors Association, Inc. v. National Constructors Association. *(click for link)* antitrust case discussed previously. As discussed more thoroughly in that portion of the Operations Manual, there are multiple issues that come into play when a national contractor refuses to make local Industry Improvement Fund contributions. Most helpful, however, is the support of the local union. Hopefully, it understands the tremendous benefit to the entire mechanical contracting industry in having an active and well-funded Industry Improvement Fund to provide well-educated, informed and effectively competitive contractors in its marketplace. Having the local union actively seek to include the Industry Improvement Fund in the contract is the most effective means to deal with the national contractor.

On the other hand, there are some additional issues for the national contractor to consider. For instance, many collective bargaining agreements will provide a bounced check security provision for Industry Improvement Fund contributors in case any payroll checks fail. If a contractor is not an Industry Improvement Fund contributor, many collective bargaining agreements provide that it must pay in cash on a weekly basis as opposed to by check. Also, on public jobs, contractors are required to file certified payrolls with the contracting agency or a state oversight agency. It may be important for the local Industry Improvement Fund to verify as to whether those certified payrolls include contributions into the local Industry Improvement Fund when the national contractor has attempted to exclude it from the local collective bargaining agreement.

Q12. *What happens if the association fails to exist and there are funds left in the Industry Improvement Fund?*

A-12. Because the Industry Improvement Fund and the affiliated trade association are separate and distinct entities, the local Industry Improvement Fund can continue to operate in accordance with its controlling documents, i.e., continue to provide programs and services for the benefit of the industry of the contributing contractors. If, however, there is not an appropriate need or purpose for the Industry Improvement Fund to continue, it should be terminated and its assets distributed in accordance with its controlling documents, the IRC and state law. It is also possible that if there is a new affiliated trade association to which the contractors have joined, then it is possible for the prior Industry Improvement Fund to

merge into either a new Industry Improvement Fund or one that is pre-existing that may be affiliated with the new trade association.

Q13. *How does the new Form 990 and instructions affect the administration of the IIF?*

A-13. The new Form 990, although drafted primarily for charitable organizations qualified under IRS §501(c)(3), there are portions of it that will impact upon the operations of an Industry Improvement Fund. Most importantly, there will be greater disclosures of compensation being paid to the employees of the Industry Improvement Fund. Likewise, there are many governance issues that will require the Board of Trustees and Officers of the Industry Improvement Fund to consider adopting conflict of interest policies, whistleblower policies, document retention and destruction policies and compensation oversight, if those procedures are not already existing. Finally, the Form 990 will be readily available to the public on-line through the Internal Revenue Service website.

Q14. *If a union official plays golf or attends dinner with a trustee or official of an Industry Improvement Fund, at what threshold does the Fund have to file Form LM-10?*

A-14. Form LM-10 would have to be filed by an employer who pays or reimburses expenses for a union official in excess of $250 in the aggregate during the payor's applicable fiscal year. For instance, if the Industry Improvement Fund is on a calendar year, monies expended for the benefit of a union official or employee of the union within that calendar year that exceeded $250 in the aggregate would have to be reported on Form LM-10 no later than ninety (90) days after the end of the calendar year, or March 30th. If the Industry Improvement Fund was on a fiscal year, for instance, July 1 through June 30, then the Form LM-10 would have to be filed no later than ninety (90) days after the end of June 30th, or September 30th.

Q15. *If an employer has paid for golf or dinners for a union official that would require an LM-10 to be filed and subsequently receive a check from the local union covering those expenses, is the employer still required to file the LM-10?*

A-15. No, reimbursements that are received within a reasonable period of time after the payment do not have to be reported on Form LM-10. This rule applies even if the employer crosses over into a new filing year. For instance, if there is a holiday party at the end of a calendar year that would move several union officials over the de minimis threshold of $250 but within a reasonable time after the first of the year, the Industry Improvement Fund is reimbursed for the cost of that event, then it would not have to be reported.

Q16. *Can an IIF charge union officials the member rate to attend functions that are subsidized? For example, if a dinner is costing the Industry Improvement Fund $200 a head and*

members that are attending are charged $85, what is the impact if the union official is charged the same fee?

A-16. If the union official pays the $85 to attend the dinner, but it costs the Industry Improvement Fund $200 per person, the difference of $115 is deemed to be a transfer of value to the union official and it would go towards the aggregate of $250 for that year. If during the year the Industry Improvement Fund exceeds the $250 aggregate, the $115 excess expense would have to be reported on the Form LM-10. This assumes that the event does not qualify as a "widely attended gathering."

Q17. *What kind of records should be maintained to keep track of "de minimis" expenses?*

A-17. Because the "de minimis test" is on an aggregate basis across an entire fiscal year, it is important to obtain and maintain receipts for all expenses involving the union, union officials and employees for the entire year. The records can take numerous forms such as receipts, invoices, vouchers, worksheets, checks, resolutions or any other contemporaneous paper or electronic record that identifies the value provided to the union official. They must be maintained for at least five years from the date the report is filed.

Q18. *What is the definition of a "union official"?*

A-18. An employer's filing obligation for the Form LM-10 is not limited to amounts paid just to "union officials." It involves the union, all union officers (elected, non-elected), all union employees or their agents. For instance, the OLMS has made it clear that payments or gifts to the clerical or custodial employees of a union that exceed $250 in the aggregate during a fiscal year are reportable on Form LM-10. The disclosure obligations of the employer on Form LM-10 are much broader than those on the Form LM-30, so a training coordinator for JATC or an unelected union official would both be individuals that would require a Form LM-10 if money is paid on their behalf or they are reimbursed more than $250 in the aggregate during a fiscal year.

Q19. *What is the exposure for not filing a Form LM-10 when one is required?*

A-19. Failure to file the Form LM-10 when required can result in both civil enforcement and criminal violations. The Secretary of Labor may bring a civil action in Federal District Court for such relief including an injunction as may be appropriate to enforce compliance with the LMRDA reporting and disclosure requirements. Further, the LMRDA prescribes criminal penalties against the president and treasurer or corresponding principal officers of the reporting employer for willful failure to file a report or for false reporting. False reporting includes making any false statement or misrepresentation of a material fact while knowing it to be false, or for knowingly failing to disclose a material fact in a required Form LM-10. Penalties can be a fine of not more than $10,000 or imprisonment for not more than one year or both.

Q20. *If your spouse attends a Industry Improvement Fund meeting where her travel costs are less than $600, does the IIF have to file a Form 1099?*

A-20. No, there is not an obligation to file a Form 1099 but the amount of money paid on behalf of the spouse may still be taxable income to the Officer or Trustee of the Industry Improvement Fund.

Q21. *What are the risks of having a separate Labor Management Cooperation Committee (LMCC) pay for labor expenses?*

A-21. Given the separate purposes for which an Industry Improvement Fund and Labor Management Cooperation Committee are formed, it is always more appropriate to have the LMCC pay for expenses related to labor relations. Expenses, however, should be analyzed on a case by case basis.

Q22. *If you have an education program that attendees from outside the Industry Improvement Fund attend, and they are charged a fee to attend, do you have to pay unrelated business income tax on their registration fees?*

A-22. Unrelated business income tax is assessed on income derived from business ventures that are not rarely carried on and are not substantially related to its tax exempt purpose. If the educational program is directly related to the purposes of the Industry Improvement Fund, attendance fees would not be unrelated business income. If there is a question as to whether the educational program is not substantially related to the IIF's tax-exempt purposes, the cost of running the program may be offset against the registration fees, therefore, reducing the amount of unrelated business income.

Q23. *Can the Executive Director of an Industry Improvement Fund hire outside professionals such as a certified public accountant, an attorney directly, or does the hiring of outside professionals have to done by the Board of Trustees?*

A-23. The Executive Director of an IIF can be delegated the authority by the Board of Trustees to provide the hiring of all outside professionals. It, however, would be a better practice in light of new IRS and accounting rules, for the Executive Director to be charged with bringing candidates to the Board for review and consideration with the Board doing the ultimate hiring. Alternatively, the Board could appoint a Committee to work with the Executive Director to bring recommendations to the full Board.

Q24. *If the Industry Improvement Fund commences an audit program to verify contributions, should the audit reports be provided to the contributing employers? Are there specific audit requirements for an Industry Improvement Fund?*

A-24. It is the obligation of the Board of Trustees of an Industry Improvement Fund to be diligent in the collection of contributions and to verify that those set forth in its controlling documents are made timely and accurately. If, in the opinion of the Board of Trustees of the Industry Improvement Fund, it is necessary to commence an audit of some or all contractors, the audit reports regarding an individual contractor should be provided to that contractor with a request for payment for any deficiencies that are noted. It may be common practice in the local jurisdiction of the Industry Improvement Fund that the employee benefit plans are conducting an audit program. It may be in the best interest of the Industry Improvement Fund to have its contributions included in that audit program and pay its pro rata share of the expenses. There are no peculiar or unusual auditing requirements for an Industry Improvement Fund that make them distinct from employee benefit plans, although the contribution formula or contribution base may be different and the auditor should be so informed.

Q25. *Can you have the same committee members on the local MCA affiliate and the Industry Improvement Fund?*

A-25. There is no legal prohibition to having the same individuals serve on both entities unless there is language in the controlling documents to the contrary. A conflict of interest, however, may arise if there is an agreement between the Industry Improvement Fund and the local MCA affiliate for administrative services. Both parties to that agreement need to be represented in the negotiation by individuals without a dual interest so that they are treated fairly. It, therefore, would be important to have some Board members serve only one entity and not both.

Q26. *Does the IIF need to have a separate annual report?*

A-26. Because the Industry Improvement Fund is a separate legal entity from the local MCA affiliate, it is important that they be separately identified and that their financial and corporate records not be co-mingled. There should be operations and programs which are clearly run by the local MCA affiliate and those which are run by the Industry Improvement Fund. It is important that the contributors to the Industry Improvement Fund which are typically larger in number than those that are members of the local MCA affiliate understand that they are getting fair value for their contributions.

Q27. *Should the IIF's financial reserves be larger than the local MCA affiliate's reserves?*

A-27. The amount of reserves of either organization is dependent upon their budgets and the number of programs that are being run on an annual basis. There should be an annual meeting of the Board of Trustees of both organizations to review the proposed budget and plans for the upcoming year and financial trends should be carefully followed to create greater accuracy in determining budgetary costs going forward. The amount of reserves from either organization can safely reside between one to two years of costs of running the organizations.

Q28. *If a union official requests a boycott of a product or company, could the Industry Improvement Fund or MCA affiliate be liable for antitrust violations if they participated?*

A-28. Yes, the Industry Improvement Fund or MCA affiliate would be liable if they participate in a group boycott or refusal to deal, both are per se violations of federal and state antitrust laws. Unions have a specific exemption from federal and state antitrust laws which do not extend to contractors or their associations.

Q29. *If you have non-union companies that want to join the local MCA affiliate, can the dues structure or the Industry Improvement Fund contributions be used to restrict that membership?*

A-29. The utilization of dues does not have to come into play in determining membership in the local MCA affiliate. Membership in the local MCA affiliate can lawfully be restricted to those contractors who are signatory to the local United Association collective bargaining agreement. Limiting membership to union only contractors is not a violation of federal or state antitrust laws. The access to information, seminars or educational materials, however, should not be restricted just to members. The local MCA affiliate or Industry Improvement Fund, however, may charge a higher fee to supply that information. It should be commensurate with the costs to produce it.

QUICK GUIDE TO THE PURPOSE OF INDUSTRY IMPROVEMENT FUNDS

1. To develop, stimulate, and encourage best practices in the mechanical contracting industry overall and conduct and improve labor-management relations in the mechanical contracting industry through the media of:
   A. Research
   B. Education
   C. Trade promotion activities
   D. Suitable legal action
   E. The acquisition and holding of real and personal property
2. To engage in public relations programs
3. To cooperate with public officials and representatives of other organizations
4. To foster and promote better employer/employee relationships
5. To foster and provide for the education and training of supervisory and managerial personnel
6. To promote research and experimentation
7. To promote safety in the mechanical contracting industry
8. To support the activities and programs of the Corporation and Affiliated Trade Association
9. To foster and promote compliance with all laws, regulations, and orders concerning affirmative action and equal opportunity for employment;

For a full explanation of Industry Improvement Funds purposes, See Page 13.

APPENDIX

1. **Industry Improvement Fund Agreement and Declaration of Trust**

2. **Industry Improvement Fund Articles of Incorporation**

3. **Industry Improvement Fund ByLaws**

4. **Agreement between Industry Improvement Fund and Association for Administrative Services**

5. **Proposed Antitrust Guidelines**

6. **Conflict of Interest Questionnaire**

7. **Form LM-10 and Instructions**

Appendix 1 -- Industry Improvement Fund Agreement and Declaration of Trust

Industry Improvement Fund Formed by Trust:

The Trust Agreement, properly drawn by legal counsel who is familiar with industry improvement funds, is the basis for the organization and administration of an Industry Improvement Fund. The most important paragraph is the statement of purpose because it is the basic charter accompanying the legitimate aims of the fund set by the industry in the area. The Trust Agreement should describe the duties and responsibilities of Trustees as governed by law and sound business practice. There is no fixed number of Trustees that is appropriate. Quorum requirements should be set to assure that there will be sufficient attendance to conduct business at each meeting. The most common quorum requirement is a majority of the trustees then in office. The Trustees should reflect all segments of the mechanical construction industry.

A provision must be made in the Trust Agreement to include employers signatory to the local labor agreement(s). To avoid amending the Trust Agreement each time the rate of contribution is adjusted in the labor agreements, a self-adjusting paragraph, like the one following, should be included in the trust:

> Participating Employers who signify their agreement to be bound by the terms of this Agreement and Declaration of Trust by making payments to the trust fund shall contribute those sums required under the Collective Bargaining Agreement with Local Union ___ for each hour worked for each employee working under the jurisdiction of Local(s) _____.

A suggested form of an Industry Improvement Fund Trust Agreement follows:

INDUSTRY IMPROVEMENT FUND TRUST AGREEMENT

AGREEMENT made as of this ___ day of _____, 200__ between the _____, a non-profit corporation under the laws of the State of _____ (the "Association"), and _____, _____,_____, _____,_____, and _____ (herein called "Trustees").

WHEREAS, the Association, as collective bargaining agent for mechanical contractors who, in writing, have authorized the Association to so serve, has become a party to collective bargaining agreement(s) with union(s) affiliated with the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (A.F.L. -C.I.O.) (all such unions hereinafter referred to as "Union" or "Unions") providing for the payment by employers of employer contributions into the Fund for the purposes herein provided; and

WHEREAS, the Union(s) may hereafter enter into similar collective bargaining agreements with other employers which by their terms provide for the payment of employer contributions into the Industry Improvement Fund; and

WHEREAS, the persons above-named as Trustees have been duly designated by the Association and have consented to serve as Trustees of the Fund;

IT IS THEREFORE AGREED AS FOLLOWS:

ARTICLE I
CREATION OF THE INDUSTRY IMPROVEMENT FUND

1.1 There is created by this Agreement and payments by employers, a trust fund to be known as the _____ Industry Improvement Fund for the trust purposes herein provided.

ARTICLE II
PURPOSES OF THE INDUSTRY IMPROVEMENT FUND

2.1 The Industry Improvement Fund shall be used to protect, promote, foster, and advance the interests of employers and employees engaged in the mechanical contracting and servicing industry including, but not limited to, the following pursuits:

2.1.1 To engage in public relations programs designed to create a better public understanding of the industry and to encourage greater use of the industry's services by owners and construction and service purchasers for the benefit of the general public.

2.1.2 To cooperate with public officials and representatives of other organizations on all matters of mutual interest affecting the construction industry.

2.1.3 To foster and promote better employer/employee relationships and to strive for optimum efficiency and workmanship in construction methods.

2.1.4 To foster and provide for the education and training of supervisory and managerial personnel.

2.1.5 To promote research and experimentation concerned with improving existing construction methods and developing, testing and promoting new construction materials and/or modes of construction.

2.1.6 To promote safety in the mechanical contracting industry by developing programs and activities directed at assisting, technically or otherwise, architects, engineers, specification writers, general and specialty contractors, and governmental authorities and agencies, in the formulation or improvement of federal, state, and municipal regulations and other technical and safety programs having as their object the safe, adequate and improved quality of mechanical contractors' service to the public.

2.1.7 To support the activities and programs of the Association, including collective bargaining and related matters.

2.1.8 To foster and promote compliance with all laws, regulations, and orders concerning affirmative action and equal opportunity for employment.

2.1.9 To engage in all other acts consistent with the purposes and terms of this Agreement and with the laws of _____.

2.1.10 No part of the Industry Improvement Fund shall be used for any purpose which tends to restrain or limit competition.

ARTICLE III
TRUSTEES

3.1 Number, Term and Designation. The Industry Improvement Fund shall be administered and managed by a Board of Trustees designated by the Association. The Trustees shall normally serve for ____ year terms or until their successors are appointed and qualified. The Board of Trustees shall consist of no fewer than _____ (_____) nor more than _____ (_____) in number, the number at any time to be determined by the Association.

3.2 Eligibility. All Trustees shall be appointed by the Board of Directors of the Association.

3.3 Acceptance. Upon the appointment of any Trustee, that Trustee shall execute a written acceptance of the trust.

3.4 Resignation and Removal. Any Trustee may resign by giving _____ (____) days written notice of intention to do so to the Board of Directors of the Association, or such shorter notice as said Board may approve. The Board of Directors of the Association may remove any Trustee by giving such Trustee _____ (____) days written notice by certified mail.

3.5 Meetings. Regular meetings of the Trustees shall be held at least annually. Additional meetings may be held at the request of _____ (_____) Trustees upon ten (10) days written notice, which notice shall set forth the time, date and place of the said meeting, and the proposed agenda thereof. The business of any such meeting shall be limited to the matters set forth in the said agenda. The minutes of all meetings shall be given to each Trustee.

3.6 Quorum and Voting. To constitute a quorum at any regular or special meeting of the Trustees, there must be at least _____ (_____) Trustees present. Each Trustee shall have one vote, and any action by the Board of Trustees shall require a majority vote of all Trustees present.

3.7 Compensation. Trustees shall receive no compensation for their services, but shall be reimbursed for expenses incurred in discharging their duties as Trustees.

3.8 By-laws. The Trustees may adopt such by-laws, rules of procedure, and regulations, not inconsistent with this Industry Improvement Fund Trust Agreement, as are deemed desirable for the conduct of Fund affairs. They may retain such accountants, specialists, or other persons as they deem necessary or desirable in connection with the administration of the Industry Improvement Fund.

3.9 Delegation. The Trustees may in writing authorize any one or more of their number to: execute any document or documents on behalf of the Trustees; open and keep an account in any financial institution, in the name of the Industry Improvement Fund; cause to be deposited in said financial institution to the credit of the Industry Improvement Fund any and all monies, checks, notes, drafts, acceptances, stocks, bonds or other securities, or other evidence of indebtedness belonging to the Industry Improvement Fund, to execute checks and other items for and on behalf of the Industry Improvement Fund; and endorse or authorize endorsement of checks and other items payable to the Industry Improvement Fund for deposit. The Trustees shall notify the financial institution in writing of such action and the financial institution may thereafter accept and rely upon the authority of such designated Trustee or Trustees as representing action by the Trustees until such time as the Trustees shall file with the bank or banks a written revocation of such authority.

ARTICLE IV
POWERS OF TRUSTEES

4.1 In General. The Trustees are authorized to exercise, in their discretion, all powers necessary to accomplish the purposes of the Industry Improvement Fund, including the following powers:

4.1.1 To collect and receive all contributions to the Industry Improvement Fund, whether directly or indirectly or through an agent designated by the Trustees; to specify the time, manner and place of payment of contributions and shall notify each employer contributor in writing of these requirements; in addition to any other remedies which may be available, to specify that an employer paying contributions shall pay such rate of interest and/or such penalty as the Trustees may fix from time to time on the monies due to the Trustees, from the due date to the date of payment, together with all expenses of collection, including reasonable attorneys fees incurred by the Trustees; from time to time require any or all employer contributors (including reasonable categories) to post a cash or surety bond, in such amount as the Trustees shall determine from time to time to guarantee payment of contributions.

4.1.2 To keep such portion of the assets of the Industry Improvement Fund in cash or cash balances as may seem to be in the best interests of the Industry Improvement Fund, without liability for the interest thereon.

4.1.3 To cause any securities or other property held as assets of the Industry Improvement Fund to be registered in its own name or in the name of one or more of its nominees, but the books and records of the Trustees shall at all times show that all such investments are assets of the Industry Improvement Fund.

4.1.4 To vote upon any stocks, bonds, or other securities; to give general or special proxies or powers of attorney with or without power of substitution; to exercise any conversion privileges, subscription rights or other options, and to make any payments incidental thereto; to oppose, or to consent to, or otherwise participate in, corporate reorganizations, or other changes affecting corporate securities, and to delegate discretionary powers, and to pay any assessments or charges in connection therewith, and generally to exercise any of the powers of an owner with respect to stocks, bonds, securities, or other property held as assets of the Industry Improvement Fund.

4.1.5 To establish one or more bank accounts in a bank or banks selected by them; to borrow money, issue notes and other evidences of indebtedness or obligations from time to time for any lawful purposes, and to mortgage, pledge or otherwise charge any or all of the properties, rights, privileges and assets of the Fund in accordance with the purposes of the Industry Improvement Fund.

4.1.6 To operate a checking account, and to deposit any reserve funds in a savings account of any bank, or to invest such funds in securities of the United States Government or such other investments in accordance with the [State] Prudent Investor Act.

4.1.7 To purchase, contract for, lease or acquire property any other lawful way, and to take, hold and own property of all kinds, and to sell, mortgage, lease and otherwise dispose of such property for the purposes of the Industry Improvement Fund, all as the Trustees may deem

necessary in the performance of their duties.

4.1.8 To compromise, settle or defend any claims against the Industry Improvement Fund.

4.1.9 To contract with the Association for services and facilities deemed necessary by the Trustees for the proper and efficient administration of the Industry Improvement Fund and in carrying out policies and programs adopted from time to time by the Trustees consistent with the purposes set forth in Article II and to pay to the Association such sums for such services and facilities as may be reasonably necessary in the discretion of the Trustees, to achieve the purposes of this Agreement.

4.1.10 To make contributions, donations, or grants, in furtherance of the purposes of the Industry Improvement Fund.

4.1.11 Through legal counsel of the Trustees' selection, to prosecute and defend legal and administrative actions or participate therein as non-parties or *amicus curiae*, in matters which are determined by the Trustees to have a material impact upon the mechanical contracting industry in pursuit of the purposes set forth in Article II.

4.1.12 To do everything that may be necessary, suitable or proper for the accomplishment of any of the purposes hereinbefore enumerated, and others not specifically mentioned herein, as the Trustees may deem necessary to administer the Trust Fund and carry out the purposes of this Agreement.

ARTICLE V
LIABILITY OF TRUSTEES*

5.1 In General: A Trustee of the Industry Improvement Fund shall not be liable personally to the Fund for breach of any duty owed to the Fund, except that this Article V shall not relieve a Trustee from liability for any breach of duty based on an act or omission that is either (i) in breach of such Trustees duty of loyalty to the Industry Improvement Fund, (ii) not in good faith or involves a knowing violation of law, or (iii) results in receipt by such Trustee of an improper personal benefit. Nothing in this Article V shall operate to diminish or otherwise affect any limitation of liability which is conferred upon non-profit trusts by state or federal law.

5.2 Indemnity. The Industry Improvement Fund shall indemnify each Trustee against any and all claims, loss, damages, expense and liability arising from any action or failure to act and shall indemnify said Trustee against the costs of defending the same, except when the same is judicially determined to be incurred by the Trustee because of gross negligence or willful misconduct. Except as provided in 5.3 below, the Trustees shall not be required to give bond to secure the performance of this Agreement.

5.3 Bonds. Any Trustees or employee or agent appointed by the Trustees who has access to funds, shall keep in force a bond in the form and amount, with a surety approved by the Trustees, conditioned for the restoration to the Board of Trustees on their death, resignation or removal from office all books, papers, vouchers, money and property of any kind or under their control belonging to the Trust Fund. The cost of such bonds shall be an expense of the Industry Improvement Fund.

**[Note: Each state has enacted legislation that provides a limitation of liability and indemnification for non-profit trustees, directors and officers. If the Industry Improvement Fund is in the form of a non-profit corporation, the appropriate statutes should be incorporated into the Certificate of Incorporation and Bylaws of the organization]*.

ARTICLE VI
CONTRIBUTIONS

6.1 Contributions shall be made by the employers bound by collective bargaining agreements between the Association and the Union(s) or between individual employers and the Union(s), that provide for such contributions. The actual payment of the contribution is and remains the responsibility of the individual employers who are represented by the Association and all other employers signatory to a collective bargaining agreement, or any related agreement which is of substantially the same effect, or any renewal of the existing collective bargaining agreement, or any new agreement between the Association or an individual employer and the Union(s). No employer shall have any obligation to make any contribution in furtherance of this Industry Improvement Fund except as specified in its collective bargaining agreement. The amounts contributed shall be as specified in the collective bargaining agreement.

6.2 The contributions to be paid into the Industry Improvement Fund by an employer shall not be deemed as due or owing to employees represented by the Union or to any contributing employers, nor shall such contributions in any manner be liable for or applicable to their debts, obligations or liabilities. Neither the parties hereto nor any beneficiary under any plan adopted by the Trustees shall have any right, title, interest or claim in or to the Industry Improvement Fund, except as herein specifically provided.

6.3 The Trustees shall receive any contributions paid to them. All contributions so received, together with the income therefrom shall be held, managed and administered in trust pursuant to the terms of this Agreement.

ARTICLE VII
RECORDS

7.1 Duty to Maintain. The Trustees shall maintain records and books of account relating to the Trust Fund. Such records and books of account shall be made available for inspection, on request, by any Trustee and any authorized representative of the Association designated by its Board of Directors.

7.2 Annual Audit. The Industry Improvement Fund shall be subject to annual audit by a certified public accountant selected by the Trustees with the approval of the Association Board of Directors. The audit shall be conducted in accordance with generally accepted auditing standards for the purpose of rendering an unqualified opinion that the financial statement of the Trust fairly presents its financial position, the result of its operations and the changes in its financial position, as of the end of the periods examined, in conformity with generally accepted accounting principles applied on a consistent basis. The results of such audits shall be furnished to each Trustee and to each Director of the Association.

7.3 Tax Exemption. The Trustees shall cause the Industry Improvement Fund to file the proper application to qualify as a tax exempt organization under Section 501(c)(6) of the Internal Revenue Code, and to periodically file such returns and supporting information as may be required to maintain the tax exemption from federal income tax.

ARTICLE VIII
DISBURSEMENT OF TRUST FUNDS

8.1 The Trustees shall have the right to pay expenses and to use the funds collected for the purposes set forth in Article II hereof or for any additional or related purposes as the Trustees from time to time prescribes.

ARTICLE IX
AMENDMENT

9.1 The provisions of this Agreement may be amended at any time by written agreement executed by the Association; provided, however, no such amendment shall affect the duties of the Trustees without their consent.

ARTICLE X
CONSTRUCTION

10.1 The provisions of the Agreement shall be construed in a manner consistent with the laws of _____ and applicable federal laws, and should any provision hereof be determined by a court of competent jurisdiction or other public authority to be unlawful or

otherwise unenforceable, all other provisions hereof shall remain in full force and effect. Interpretations as to the application or meaning of any provision hereof shall be solely and exclusively in the discretion and determination of the Trustees, provided, however, they are made in accordance with the laws of _____.

ARTICLE XI
DURATION AND TERMINATION

11.1 The Industry Improvement Fund herein created, unless terminated sooner by action of the parties, shall remain in full force and effect for the maximum period permitted and provided by the laws of the State of _____. The Industry Improvement Fund may be terminated when there is no longer in force a collective bargaining agreement requiring employer contributions for the purposes herein provided. Upon the dissolution of the Industry Improvement Fund, the Trustees shall, after paying or making provision for the payment of all of the liabilities of the Industry Improvement Fund, dispose of all of the assets of the Industry Improvement Fund exclusively for the purposes of the Industry Improvement Fund, or to such organization or organizations organized and operated exclusively for charitable, educational, religious, or scientific purposes as shall at the time qualify as an exempt organization or organizations under Section 501(c)(6) of the Internal Revenue Code of 1986, as amended from time to time.

ARTICLE XII
MISCELLANEOUS

12.1 Neither the establishment of the Industry Improvement Fund hereby created, nor any modification thereof, nor the creation of any fund or account, nor the payment of any sum shall be construed as giving to any person any legal or equitable right against any employer, the Association, or the Trustees except as herein provided. No employer or employee shall have any right to the funds at termination or at any other time, and no part of the earnings shall inure to the benefit of any individual.

12.2 In any action or proceedings involving the Industry Improvement Fund, or any property constituting part or all thereof, or the administration thereof, the Trustees shall be the only necessary parties and no other persons shall be entitled to any notice of process. Any final judgment which is not appealable that may be entered in any such action or proceeding shall be binding and conclusive on the parties hereto and all persons having or claiming to have any interest in the Trust Fund.

12.3 No person or organization precluded from participation in any manner by Section 302 of the Labor Management Relations Act as amended or by any other applicable Federal or State law shall participate in or have any interest whatsoever in this Industry Improvement Fund or

the operation, management or control thereof, nor shall any such person or organization be entitled to any benefits under this Industry Improvement Fund.

IN WITNESS WHEREOF, the Association has caused this Agreement to be executed by its duly authorized officers.

ATTEST: _____ Association

_____ By:_____

Secretary President

The undersigned Trustees hereby accept the terms and conditions of this Agreement and promise to perform the duties and obligations imposed hereby.

_____
Trustee

_____
Trustee

_____
Trustee

_____
Trustee

_____
Trustee

Date of execution:

_____ day of _____, ____

Appendix 2 -- Industry Improvement Fund Articles of Incorporation

Industry Improvement Fund Formed by Corporation:

Generally, a certificate of incorporation or articles of incorporation should set forward the name of the corporation and the purpose for which the corporation is organized. Where applicable, the certificate or articles should also identify the total number of shares which the corporation will have the authority to issue and the designation of the shares. The address of the corporation's registered office and an agent for service of process should also be specified, as should the number of board directors.

A suggested form of Articles of Incorporation follows:

ARTICLES OF INCORPORATION
OF

A [STATE] NOT-FOR-PROFIT CORPORATION

The undersigned, for the purpose of forming a nonprofit corporation under Chapter 617 of the [State] Statutes, adopts the following Articles of Incorporation:

ARTICLE ONE
NAME AND ADDRESS

The name of the corporation is _____" (the "Corporation"). The principal address of the Corporation at the time of incorporation is _____ _____, [City], County of [County], [State].

ARTICLE TWO
NOT-FOR-PROFIT

The Corporation is a not-for-profit corporation as defined in the [State] Not-For-Profit-Corporation Act, set forth in Chapter 617 of the [State] Statutes. The Corporation is not formed for pecuniary profit. No Trustee or Officer of the Corporation or other individual shall as such receive or become entitled to receive at any time any part of the net earnings or other net income of the Corporation, nor shall any part of the net earnings of the Corporation inure to the benefit of any person, except as reasonable compensation for services rendered and reimbursements for expenses incurred in conducting its affairs and carrying out its purposes.

ARTICLE THREE
DURATION

The duration of the Corporation is perpetual unless dissolved according to law.

ARTICLE FOUR
PURPOSES

The purposes for which the Corporation is organized are to engage in the following activities:

(a) To develop, stimulate, and encourage the mechanical contracting industry and conduct and improve labor-management relations in the mechanical contracting industry through the media of research, education, trade promotion activities, suitable legal action, the acquisition and holding of real and personal property without limitation as to amount, and through such other means and methods as the Corporation shall deem desirable or necessary and the collection of contributions from the employers eligible to participate in the activities of this Corporation and the expenditure of funds to carry out these purposes.

(b) To engage in public relations programs designed to create a better public understanding of the industry and to encourage greater use of the industry's services by owners and construction and service purchasers for the benefit of the general public.

(c) To cooperate with public officials and representatives of other organizations on all matters of mutual interest affecting the construction industry.

(d) To foster and promote better employer/employee relationships and to strive for optimum efficiency and workmanship in construction methods.

(e) To foster and provide for the education and training of supervisory and managerial personnel.

(f) To promote research and experimentation concerned with improving existing construction methods and developing, testing and promoting new construction materials and/or modes of construction.

(g) To promote safety in the mechanical contracting industry by developing programs and activities directed at assisting, technically or otherwise, architects, engineers, specification writers, general and specialty contractors, and governmental authorities and agencies, in the formulation or improvement of federal, state, and municipal regulations and other technical and safety programs having as their object the safe, adequate and improved quality of mechanical contractors' service to the public.

(h) To support the activities and programs of the Corporation including collective bargaining and related matters.

(i) To foster and promote compliance with all laws, regulations, and orders concerning affirmative action and equal opportunity for employment.

(j) To engage in all other acts consistent with the purposes and terms of the Articles of Incorporation, the Bylaws and with the laws of the State of [State].

(k) To exercise all rights and powers conferred by the laws of the State of [State], and specifically as provided in state statute [ ], on not-for-profit corporations, including but not limited to the right and power to acquire by bequest, devise, gift, purchase, lease, or otherwise any property of any sort or nature without limitation as to its amount or value, and to hold, invest, reinvest, manage, use, apply, employ, sell, expend, disburse, lease, mortgage, convey, option, donate, or otherwise dispose of such property and the income, principal, and proceeds of such property, for any of the purposes set forth in these Articles of Incorporation.

(l) To do such other things as are incidental to the purposes of the Corporation or necessary or desirable in order to accomplish them.

(m) The purposes of the Corporation shall at all times remain in compliance with 501(c)(6) of the United States Internal Revenue Code of 1986 and applicable Treasury Regulations thereunder as the same may be from time to time amended, supplemented or succeeded, which Code and Treasury Regulations (or corresponding provisions of any future Federal internal revenue law) are hereinafter collectively referred to as the "Code."

ARTICLE FIVE
POWERS

The powers of the Corporation shall be as enumerated in the [State] Not-For-Profit Corporation Act (State ststue [ ]) and as set forth in the Bylaws.

ARTICLE SIX
MEMBERS

The Corporation shall have members, whose qualifications shall be as set forth in the Bylaws of the Corporation.

ARTICLE SEVEN
REGISTERED OFFICE AND AGENT

The street address of the initial registered office of the Corporation is _____ _____, County of _____, [ ] stste, and the name of its registered agent at that address is _____.

ARTICLE EIGHT
BOARD OF TRUSTEES

The Board of Trustees shall consist of _____ Trustees. The names and addresses of the persons who are currently serving as Trustees are set forth on Schedule A attached. The method of electing Trustees shall be as set forth in the Bylaws of the Corporation.

ARTICLE NINE
BYLAWS

The Bylaws of the Corporation are to be adopted by the Board of Trustees at the first meeting of the Board of Trustees. Bylaws shall only be made, amended, restated, and/or repealed in accordance with the procedures set forth in the Bylaws.

ARTICLE TEN
AMENDMENT

These Articles of Incorporation shall only be amended, restated, and/or repealed in accordance with the procedures set forth in the Bylaws.

ARTICLE ELEVEN
DISTRIBUTION ON DISSOLUTION

Upon dissolution, liquidation, termination or winding up of the Corporation, whether voluntary, involuntary or by operation of law, the property and assets of the Corporation shall be distributed as set forth in the Bylaws of the Corporation.

ARTICLE TWELVE
INCORPORATORS

The name and address of the Incorporator is as follows: _____ _____.

ARTICLE THIRTEEN
EFFECTIVE DATE

These Articles of Incorporation shall be effective upon filing with the Department of State of [State].

ARTICLE FOURTEEN
REFERENCES

Any reference herein to specific provisions of the laws of the State of [State] or the Internal Revenue Code of 1986, shall be construed to include subsequent amendments to such specific provisions and to include corresponding provisions of subsequent legislation which may restate, supersede or otherwise alter such provisions.

IN WITNESS WHEREOF, the undersigned, being the Incorporator for the purpose of forming a not-for-profit corporation under the laws of the State of [State], does make and file these Articles of Incorporation, does certify that the facts stated herein are true, and accordingly has set his hand and seal this _____ day of _____, 20__.

_____
Name:_____
Incorporator

Having been named as registered agent to accept service of process for the Corporation at the place designated in these Articles of Incorporation, I am familiar with and accept the appointment as registered agent and agree to act in this capacity.

_____
Name:_____
Title:_____

SCHEDULE A
TO THE
ARTICLES OF INCORPORATION
OF _____,
A [STATE] NOT-FOR PROFIT CORPORATION

The names and addresses of the persons who are currently serving as Trustees are as follows:

Appendix 3 -- Industry Improvement Fund ByLaws

BYLAWS
OF INDUSTRY IMPROVEMENT FUND OF
MECHANICAL CONTRACTORS ASSOCIATION OF _____, INC.

ARTICLE 1
NAME

The name of the corporation is "Industry Improvement Funds of Mechanical Contractors Association of _____, Inc.", a corporation organized under the not-for-profit laws of the State of [State]. It shall hereinafter be referred to as the "Corporation".

ARTICLE 2
PURPOSE

2.1 Purposes. The purposes for which the Corporation is organized are to engage in the following activities:

(a) To protect, promote, foster and advance the interests of employers and employees engaged in the "Mechanical Contracting Industry" which, as used herein, shall include but not be limited to the furnishing and installation of equipment and piping systems, or parts thereof, for steam and hot water heating, plumbing, ventilating, refrigeration, air conditioning, high and low pressure boilers, unit heaters, unit ventilators, unit air conditioners, stokers, oil burners, gas burners, power piping, industrial process piping, temperature control piping, pneumatic and hydraulic piping, vacuum cleaning piping, nuclear energy facilities and all apparatus, equipments, appurtenances and piping systems in connection therewith, regardless of whether such piping conveys steam, water, air, gas, gasoline, brine, ammonia, oil, or other fluids, or other commercial products, or products in course of manufacture, and the performing or subcontracting of such other work as may be necessary or required in the mechanical contracting industry.

(b) The standardizing of materials.

(c) The improvement of the character of work done and labor employed, and by better public service to advance the industry in all its branches.

(d) The promotion of the interests of its members, their protection against unfair demands and adverse conditions of their peaceful relations with their employees through agreement and otherwise.

(e) Cooperation or affiliation with other associations having a like or kindred purpose or purposes.

(f) The maintenance of headquarters suitable for the orderly performance of its purposes.

(g) To foster and promote compliance with all laws, regulations and orders concerning affirmative action and equal opportunity for employment.

(h) To engage in all other acts consistent with the purposes and terms of the Articles of Incorporation and the Bylaws as the same may be amended from time to time.

(i) To provide the opportunity for exchange of ideas and opinions, and for study and discussion, of various business and technical aspects of the "Mechanical Contracting Industry" in the State of [State]; to promote the "Mechanical Contracting Industry" in the State of [State]; to develop and encourage high standards of service for members serving the industry and the public; and to acquire, preserve and disseminate data and information to members and to the public relating to the "Mechanical Contracting Industry".

(j) To exercise all rights and powers conferred by the laws of the State of [State], and specifically as provided in state statute [ ], on not-for-profit corporations, including but not limited to the right and power to acquire by bequest, devise, gift, purchase, lease, or otherwise any property of any sort or nature without limitation as to its amount or value, and to hold, invest, reinvest, manage, use, apply, employ, sell, expend, disburse, lease, mortgage, convey, option, donate, or otherwise dispose of such property and the income, principal, and proceeds of such property, for any of the purposes set forth in these Bylaws.

(k) To do such other things as are incidental to the purposes of the Corporation or necessary or desirable in order to accomplish them.

(l) The purposes of the Corporation shall at all times remain in compliance with 501(c)(6) of the United States Internal Revenue Code of 1986 and applicable Treasury Regulations thereunder as the same may be from time to time amended, supplemented or succeeded, which Code and Treasury Regulations (or corresponding provisions of any future Federal internal revenue law) are hereinafter collectively

referred to as the "Code."

ARTICLE 3
TERRITORY

The Territory in which the operations of this Corporation are to be conducted shall encompass the State of [State] in its entirety.

ARTICLE 4
MEMBERS

4.1 Classes of Membership.

(a) Regular. This Corporation shall be composed of corporations, firms and individuals who are regularly engaged in the business of mechanical contracting as defined in Article 2, who have been properly elected to membership and who shall comply with all conditions and requirements of membership.

(b) Honorary. Honorary membership may be conferred upon a former active member or others who may have rendered unusual service to this Corporation upon the unanimous recommendation of the Board of Directors, confirmed by ninety (90%) percent of all members present at the next regular meeting of the Corporation. Honorary members shall pay no dues, shall have no vote, nor shall they be required to perform any such duties as may be expected from regular members.

4.2 Application Procedure.

(a) Application for membership shall be properly signed by the applicant on the form furnished by the Corporation and shall contain acceptance and agreement to abide by the Bylaws. The application shall be accompanied by the initiation fee and shall immediately be referred to the Board of Directors.

(b) At its next regular meeting following receipt of application for membership, the Board of Directors shall consider the application submitted and either recommend acceptance or rejection or defer such action pending receipt of any additional information required to properly pass upon qualifications of the applicant. When the Board of Directors recommends acceptance or rejection, this recommendation must be submitted to the membership for final action. In order to become a member, an

applicant's acceptance by the Board must be confirmed by a majority of the members present at the next regular meeting of the Corporation. In the event an applicant is rejected for membership by the Corporation, the initiation fee shall be immediately returned to such applicant.

(c) The initiation fee for membership in this Corporation shall be recommended by the Board of Directors and approved by the members of the Association.

4.3 Meetings of Members.

(a) Annual Meeting. The Annual Meeting of this Corporation shall be held in June of each year at such time and place as may be selected by the Board of Directors.

(b) Regular Meetings. This Corporation shall hold at least eight regular meetings at such time and place as may be selected by the Board of Directors and approved at the next regular meeting of this Corporation.

(c) Special Meetings. Special meetings shall be called by any officer of the Corporation or by the Secretary when requested in writing by five (5) or more members in good standing.

(d) Quorum. One-third of the membership of the Corporation shall constitute a quorum at all meetings. All decisions shall be by a majority vote of those present.

(e) Order of Business, Annual Meetings.

1. Roll Call.
2. Reading of the minutes of the preceding annual meeting.
3. Presentation of annual report of Directors.
4. Annual report of Officers.
5. Election of officers and directors as provided in Article VII.
6. Other business which may properly come before a regular meeting.
7. Adjournment.

(f) Order of Business, Regular Meetings.

1. Reading of the minutes of the previous meeting.
2. Roll Call (written or vocal).
3. Report of the Secretary.
4. Communications.
5. Unfinished business.
6. New Business.

7. Adjournment.

(g) Order of Business, Special Meetings.

1. Roll Call (written or vocal).
2. Reading of the call for the meeting.
3. The transaction of the business indicated in the call for the meeting.
4. Adjournment.

(h) Procedural Rules. The meetings of this Corporation, where not otherwise provided, shall be governed by rules and regulations of Parliamentary Law in accordance with Robert's Rules of Order.

(i) Action Without a Meeting. Any action required or permitted to be taken at a meeting of the members may be taken without a meeting if all the members consent thereto in writing.

(j) Notice of Meeting. Written notice of the date, hour, place and purpose or purposes of all meetings of the members shall be given by the Secretary, by mail, addressed to the members at the last address furnished to the Secretary, and shall be mailed by regular mail, with postage prepaid thereon, at least ten (10) days prior to but no more than sixty (60) days prior to the designated date of the meeting; provided, however, that such notice need not be given where all of the members, before or after such meeting, sign a waiver of such notice. When a meeting is adjourned to another time and place, it shall not be necessary to give notice of the adjourned meeting if the time and place to which the meeting is adjourned are announced at the meeting at which adjournment is taken; and at the adjourned meeting, only such business shall be transacted as might have been transacted at the original meeting.

To the extent authorized by law, notice of special meetings of the members may be called upon such shorter advance notice periods and other means of communication (e.g., telephone or oral communication) as circumstances may require.

4.4 Rights and Duties of Regular Members.

(a) Qualifications. Membership shall be vested in the firm or corporation as such. Any qualified and authorized representative shall be entitled to vote, and exercise all the rights and duties of membership, provided that not more than one qualified and authorized representative for each member shall vote on any motion, or at any election. Only an individual who is a "principal" of a member firm or company may hold any office or serve as a member of the Board of Directors. The "principal" of a member firm shall mean in the case of a partnership, a partner; a corporation, both a Shareholder and Executive Officer; a Limited Liability Company, the Managing

Member; or a sole proprietor for an unincorporated business.

(b) Rights and Privileges. All members shall have equal rights and privileges in the Corporation. It shall be their duty and obligation to observe all of the requirements of the Corporation, to promote its interests in all lawful and reasonable ways, and to submit to and discharge all penalties and obligations imposed pursuant to the Bylaws, rules and regulations of the Corporation.

(c) Registration with Secretary. Each member shall register with the Secretary the names and titles of all persons qualified and authorized by such member to represent him and promptly inform the Secretary of any changes which may occur. Unless so registered, no person shall be recognized as representing a member in this Corporation.

(d) Attendance. It shall be the duty of every member to be authoritatively represented at every meeting of the Corporation.

(e) Good Standing. Any member, to enjoy the privileges of the Corporation, must be in good standing. Any member in arrears six (6) months in the payment of dues shall be considered as not being in good standing and shall forfeit all rights of membership.

4.5 Termination and Suspension.

(a) Any member may tender his resignation, in writing. Such tender of resignation shall be immediately referred to the Board of Directors who shall make recommendations to be presented for action at the first regular meeting of the Corporation following receipt of tender of resignation. No resignation shall be recommended, or accepted, if member is not in good standing until such time as he becomes a member in good standing in accordance with Article 4.4(e).

(b) Any member in arrears in accordance with Article 4.4(e) or who may be found guilty of violation of the Bylaws, or Rules and Regulations of the Corporation, or who ceases to be regularly engaged in the mechanical contracting business, becomes insolvent, makes an assignment for the benefit of creditors, is adjudged a bankrupt or files a petition under the bankruptcy acts or for whom a receiver is appointed, may be recommended for suspension, or expulsion, by a majority vote of the Board of Directors, provided that written charge, or charges, shall first have been made against such member by the Secretary, or a member of the Corporation in good standing, and that a copy of such charge, or charges, together with a written notice of time and place of hearing by the Board of Directors to pass upon such charges, shall be served upon such member at least four (4) days before such hearing. Action by members of

the Corporation shall be taken upon such recommendations at the next regular meeting of the Corporation and decided by a majority vote of the members present. Any member in good standing found guilty shall have a further right to appeal to the next regular meeting of the Corporation.

(c) All rights, title and interests of any member in or to the privileges, property or assets of any description of this Corporation shall cease upon termination of his membership, but his indebtedness to this Corporation, if any, shall continue until discharges to the satisfaction of a majority of the members of this Corporation.

(d) The suspension of a member shall have the same effect as termination of membership for the period of such suspension.

4.6 Reinstatement. No member who has been suspended or expelled shall be considered for reinstatement until he has discharged his indebtedness, if any, to this Corporation in full. Any applicant seeking reinstatement shall apply for membership in accordance with Article 4.2(a).

ARTICLE 5
BOARD OF DIRECTORS

5.1 Composition and Election.

(a) The Board of Directors shall consist of thirteen members, no more than one (1) of whom shall be from the same member firm or company, as follows:

1. Eight persons elected from the general membership of the Corporation.
2. The immediate Past President.
3. President
4. Vice President
5. Treasurer
6. A member of this Corporation who has his principal place of business in [State] while serving as a director of the National Association.

The terms of the eight persons elected from the general membership shall be three years, with at least two to be elected each year. The other directors shall each serve for a one (1) year term.

(b) All Past Presidents of the Corporation still active in a member firm or corporation business, except Past Presidents herein above provided for, may attend any regular meetings of the Board of Directors as *ex-officio* members. They may participate in

the deliberations of such meetings but shall not be counted in the quorum or have the right to vote.

(c) All members of the Board of Directors shall serve without remuneration except for the reimbursement of actual expenses received in fulfillment of their responsibilities as Directors.

5.2 Powers and Duties.

(a) The Board of Directors shall have, in the interim between meetings of the membership of the Corporation, the authority, power and responsibility for the general management, control and supervision of the affairs, business, activities, property and assets of the Corporation and shall make such rules, regulations and guidelines for the promotion and advancement of the Corporation and its mission and purposes as the Board of Directors may deem advisable.

(b) They shall have the sole power to authorize contracts and purchases; control the appropriation of funds; elect a Secretary and fix his tenure and compensation; approve the selection of all other employees; all subject to the approval of the members at the next regular meeting of the Corporation.

(c) They shall have no power to make the Corporation liable for any debt exceeding the funds in the hands of the Treasurer and not otherwise appropriated, without the express authority of the members of the Corporation.

(d) They shall recommend the election or rejection of all new members and have power to recommend censure by the Corporation, requirement of an apology, request for resignation of membership, suspension of membership or expulsion of any member, or members, not in good standing or who fail to comply with, or who violate any of the provisions of the Certificate of Incorporation, Bylaws, Rules and Regulations.

(e) They have the right to exercise all powers conferred by the laws of the State of [State], and specifically as provided in [State] Statute Section _____, as same from time to time may be amended, supplemented, or succeeded.

5.3 Meetings. The President may call a meeting of the Board of Directors or of any Committee of the Board of Directors, whenever in his judgment it is advisable to so do.

5.4 Special Meetings. The President shall call a meeting of the Directors whenever so requested in writing by three (3) or more Directors, within ten (10) days from the date of receipt of such request.

5.5 Notices. Notices addressed to all Directors at the address last given by them to the Secretary and deposited in the United States Post Office or mail box at least four (4) days prior to the date for which the meeting is called shall be sufficient notice to Directors. Written notice of any meeting may be waived by written waiver of notice signed by all the members of the Board of Directors and filed by the Secretary with the minutes of the meeting. To the extent authorized by law, notice of special meetings of the Board of Directors may be called upon such shorter advance notice periods and other means of communication (e.g., telephone or oral communication) as circumstances may require.

5.6 Quorum. Seven (7) Directors, including an executive officer, shall constitute a quorum at all meetings for the transaction of business.

5.7 Waivers of Notice of Board Meetings. Notice of a meeting need not be given to any member of the Board of Directors who signs a waiver of notice whether before or after the meeting, or who attends the meeting without protesting prior to the conclusion of the meeting of the lack of notice to such meeting.

5.8 Action without a Meeting. Unless otherwise provided by the Certificate of Incorporation or these Bylaws, any action required or permitted to be taken at any meeting of the Board of Directors or of any committee thereof may be taken without a meeting, if all the Directors of the Board or committee, as the case may be, consent thereto in writing, and the writing or writings are filed with the minutes of proceedings of the Board of Directors or committee.

5.9 Electronic Meetings. The Board of Directors or any committee of the Board may participate in a meeting of the Board or such committee by means of telephone conference call, video conference, or similar communication equipment, by which all persons participating are able to speak and to hear each other and participation in a meeting pursuant to this section shall constitute presence at a meeting.

5.10 Absences. In the event that any member of the Board of Directors shall fail to attend three (3) consecutive meetings of the Board, the Board, in its discretion, may direct the Secretary to notify such absent Director, by written notice, of his consecutive absences. Unless such Director, having received the Secretary's notification, shall have tendered to the President, before the next regular meeting of the Board of Directors, a written excuse that in the judgment of the Board is sufficient, the Board of Directors may declare the office of such absent Director vacant and the Secretary shall notify the absent Director, in writing, of such action.

5.11 Resignations and Removals. Any Director may resign at any time by giving written notice of his resignation to the Board of Directors or the Secretary. Any such resignation shall take effect at the time specified therein, or, if unspecified, then it shall take effect immediately upon receipt by the Board of Directors or by the Secretary. Acceptance of such resignation

by action of the Board of Directors shall not be necessary to make it effective. Any Director may be removed from office by the affirmative vote of two-thirds (2/3) of the entire Board of Directors, only for cause. Such Director may elect to appear and to be heard at the Board's meeting provided he has given written notice of his election to the Secretary at least two (2) days before the date of the meeting.

ARTICLE 6
OFFICERS

6.1 Officers. There shall be elected for a term of one (1) year, a President, a Vice President, and a Treasurer. These shall be elected at the annual meeting in June of each year, and shall serve for the designated term or until their successors are elected and have qualified or until their earlier resignation or removal.

6.2 President. The President shall have general supervision over all affairs of the Corporation; shall be the presiding and executive officer at all meetings and shall appoint all Standing Committees. He shall be *ex-officio* member of all committees.

6.3 Vice President. During a vacancy in the office of President or in the event of the inability of the President to perform his duties, the Vice President shall assume and discharge all the duties of the President.

6.4 Treasurer.

(a) The Treasurer shall oversee the custody of all funds of the Corporation. These funds shall be paid out only on check, or order, signed as provided by the Bylaws.

(b) All checks, or orders, for the payment of money must bear the signature of the Secretary or Treasurer, and the President or Vice President.

(c) He shall submit to the Board of Directors at every regular meeting a general financial statement. At the final regular meeting of each year, he shall present a financial report of the Corporation through the end of the preceding year.

(d) The Corporation's original books and vouchers shall at all times be open to the Board of Directors and shall submitted to the Finance Committee at, or prior to, the last regular meeting of the year.

6.5 Secretary/Executive Director.

(a) The Secretary shall be appointed and his compensation and tenure of office fixed by the Board of Directors, subject to the approval of the Corporation. He shall also be the Executive Director of the Corporation subject to and under the immediate control of the Directors.

(b) He shall have charge of the books and papers and correspondence of the Corporation, which books shall be open for inspection and examination by the Board of Directors at all reasonable times. He shall send out all bills, collect all moneys due the Corporation and immediately deposit same in an approved depository.

(c) He shall also select any assistants that may be required to properly conduct the business in his office, subject to the approval of the Directors.

(d) He shall have access to any books or records of any member of the Corporation for the purpose of verifying any statement made by such member, or for rendering proper statement of accounts against such member, upon instructions of the Board of Directors.

(e) All complaints shall be submitted to the Secretary in writing, and if the matter in dispute cannot be adjusted by him, he will refer same to the Board of Directors. It is understood that either party to the dispute shall have the right to appeal to the Board of Directors, and any member of the Corporation in good standing shall have the further right to appeal to the next regular meeting of the Corporation.

ARTICLE 7
NOMINATION AND ELECTION OF DIRECTORS AND OFFICERS

7.1 Nominating Committee.

(a) At the regular meeting of the Corporation in June of each year, the President shall appoint a Nominating Committee of three (3) members, no members of which shall be an officer or director of this Corporation, to canvas the membership for candidates for the following offices: President, Vice President, Treasurer, each to serve a term of one (1) year; and at least two (2) Directors, each to serve a term of three (3) years.

(b) The report of the Nominating Committee shall be presented in writing at the next regular meeting.

7.2 Nominations. After the report of the Nominating Committee has been read, the Chair shall call for nominations from the floor.

7.3 Annual Election. The annual election of this Corporation shall be held in June of each year, at such time and place as may be selected by the Board of Directors, at such time a President, a Vice President, and a Treasurer shall be elected to serve for a period of one year each, and at least two (2) members who shall be elected to the Board of Directors to serve for a period of three (3) years each, or until their successors are elected and have qualified.

7.4 Quorum. Thirty-three and one-third (33-1/3%) per cent of the members shall constitute a quorum and election shall be by ballot from nominations made. Candidates receiving the largest number of votes will be declared elected. The Chair will appoint a Judge and two (2) tellers to conduct the election.

7.5 Vacancies. Should a vacancy occur in any office or on the Board of Directors, the remaining members of the Board shall have the right to fill the vacancy by a majority vote, the person so elected to serve until the next regular election, when the usual procedure will be followed as in regular elections to fill the vacancy for the remaining portion of the unexpired term.

ARTICLE 8
DUES

8.1 (a) On or before the 15th day of each month, each member shall pay monthly dues based on the plumber, pipefitter, and service fitter payroll of such member in the State of [State] for the preceding month. For the purpose of this Section, "Plumber, Pipefitter, and Service Fitter payroll" shall mean the payroll reportable by such member to the United Association Local Union, Welfare or Pension Funds as provided in the applicable collective bargaining agreements. Each such monthly payment of dues shall be accompanied by true copies of the report forms filed by the members for each Welfare or Pension Fund.

(b) The percentage charged for dues shall be fixed from time to time by the membership, but shall in no case exceed one percent of the Plumber, Pipefitter, and Service Fitter Payroll defined above.

(c) When the reportable dues of any member exceeds three thousand five hundred dollars ($3,500.00) in any fiscal year, the payment of dues shall cease for the balance of such fiscal year.

(d) In the event any member shall fail or refuse to file his monthly report with the Corporation as herein provided, then the Board of Directors, upon five days notice in writing, may fix and determine the correct amount of dues payable. The determination of the Board of Directors shall be final and binding on all parties.

ARTICLE 9
AFFILIATED ASSOCIATIONS

9.1 (a) This Corporation may at any regular meeting or at any special meeting called for that purpose, with the votes of fifty-five percent (55%) of the members of the Corporation being in the affirmative, become affiliated with any trade association and in a like manner any such affiliation may be terminated, provided, that no vote to affiliate or terminate affiliation shall be taken, unless each member has been notified in writing of such intention at least four (4) days previous to the time at which the vote is taken.

(b) While such affiliation exists, the terms of the affiliation shall be binding upon all its members.

(c) All present affiliations shall be continued until terminated in accordance with this provision or by the other parties thereto.

ARTICLE 10
COMMITTEES

10.1 (a) The following standing committees shall be appointed by the President, subject to the approval of the Board of Directors: Finance, Education, Trade Promotion and Marketing, Labor Management, Service, Welding, Safety, and Membership, each for a period of one (1) year. Additional standing committees may be authorized from time to time by the President.

(b) The majority of the members in each Committee, or any of its subcommittees, shall have the same qualifications as stated in Article 4.1(a) of these Bylaws. The President may appoint to any such Committee, or sub-committee, the paid executive of any State or National Association recognized by this Corporation, or employee of any member whose knowledge and experience would be of value to the Committee. A Chairman for the Committee may be appointed by the President.

(c) These Committees shall be under the directions of the President, confer with him as often as may be necessary and submit to him a full report of their work. These Committees and their sub-committees shall meet at the discretion of the President.

(d) All expenses incident to the work of these committees shall be paid from the Treasury, from appropriations made by the Board of Directors, on vouchers approved by the Chairman of the Committee and the Secretary.

ARTICLE 11
MISCELLANEOUS

11.1 Fiscal Year. The fiscal year of the Corporation shall begin on the first day of July and end on the thirtieth day of June.

11.2 Annual Audit. Prior to the last regular meeting of each year, the President shall appoint a Finance Committee. This Committee shall meet, prior to the annual meeting during the last week of June, and review the original books and records of the Treasurer and report its findings to the Board of Directors. An annual audit in accordance with generally accepted auditing standards by independent certified public accountants appointed by the Board of Directors shall be made of the financial condition and results of operation of the Corporation. In August, the entire Board of Directors shall meet and review the audited financial statements of the Corporation.

11.3 Bonds. The Board of Directors shall have the power to purchase and maintain any and all surety bonds for its members, officers or Directors who may be delegated or authorized to handle funds of the Corporation or for whom bonds are otherwise required by the Corporation or those entities with which the Corporation is or may become affiliated. Premiums on such bonds shall be paid out of funds of this Corporation.

ARTICLE 12
AMENDMENTS

12.1 These Bylaws may be amended, restated, supplemented, revised or rescinded by any member or Director in good standing by submitting such amendment in writing to the Board of Directors at least sixty (60) days prior to the date on which membership would vote to approve or disapprove.

12.2 Upon receipt of such amendment, the Board of Directors of the Corporation, shall, in its sole discretion, determine whether the amendment shall be submitted to the membership for approval or disapproval. If, by the affirmative vote of two-thirds (2/3) of the members of the Board of Directors, the Board determines not to submit the amendment to the membership, then the amendment shall receive no further consideration.

12.3 If the Board of Directors determines to submit the amendment to the membership, the membership shall also be notified in writing of any proposed amendments at least ten (10) days before the meeting at which the vote is to be taken. The vote shall occur at a regular meeting at which fifty-five percent (55%) of the membership who are in good standing are present. Any decision must be by a majority vote of those present.

ARTICLE 13
INDEMNIFICATION

13.1. Basic Indemnification.

(a) The Corporation shall, to the fullest extent permitted by the [State] Not-for-Profit Corporation Law, indemnify any present or former Director, officer, employee or agent of the Corporation or the personal representatives thereof, made or threatened to be made a party in any civil or criminal action or proceeding by reason of the fact that such Director, officer, employee or agent, or his or her testator or intestate, is or was a Director, officer, employee or agent of the Corporation or, at the request of the Corporation, served any other organization, entity or other enterprise in any capacity, if (i) the Director, officer, employee or agent acted in good faith and in a manner which the agent reasonably believed to be in or not opposed to the best interests of the Corporation; and (ii) with respect to any criminal proceeding, the Director, officer, employee or agent had no reasonable cause to believe the conduct was unlawful.

(b) All such indemnified costs and expenses incurred shall be advanced by the Corporation pending the final disposition of such action or proceeding if authorized by the Board of Directors; provided, however, that no indemnification shall be made if a judgment or other final adjudication adverse to the Director, officer, employee or agent establishes that his acts or omissions (i) were in breach of his duty of loyalty to the Corporation, (ii) were not in good faith or involved a knowing violation of law, or (iii) resulted in receipt by the corporate agent of an improper personal benefit.

(c) Indemnification under this Article 13 shall be made only as authorized by a majority vote of disinterested Directors or, if such a quorum is not obtainable, by independent legal counsel in a written opinion. No indemnification shall be made if such indemnification would be inconsistent with the provisions of these Bylaws, a resolution of the Corporation's members or Board of Directors or other proper corporate action, as any such of the foregoing may be in effect at the time of the accrual of the alleged cause of action asserted in the threatened or pending action or proceeding, which prohibits or otherwise limits such indemnification.

13.2 Insurance of Risk. The Board of Directors shall have the power to purchase and maintain insurance to indemnify the Corporation, its members, Directors, officers, employees and agents of the Corporation, and other persons otherwise entitled to indemnification, to the full extent and in such circumstances as is permitted under the [State] Not-for-Profit Corporation Law.

ARTICLE 14
CONFLICT OF INTEREST

14.1 Purpose of Conflicts of Interest Policy. The purpose of this conflicts of interest policy is to protect the interests of the Corporation when it is contemplating entering into a transaction or arrangement that might benefit the private interest of a Director or officer of the Corporation. This policy is intended to supplement but not replace any applicable state laws governing conflicts of interest applicable to business corporations. Any duality of interest or possible conflict of interest of a Director shall be disclosed to the other members of the Board and made a matter of record through an annual procedure and also when the interest becomes a matter of Board action; provided, however that a member of the Board shall not be deemed to have any duality of interest or possible conflict of interest by reason of serving, or having served, on the Board of Directors of any corporation which is affiliated with the Corporation.

14.2 Definitions.

(a) "Interested Person": Any Director, officer or member of a committee with Board delegated powers who has a direct or indirect Financial Interest, as that term is defined below, is an Interested Person.

(b) "Financial Interest": A person has a Financial Interest if the person has, directly or indirectly, through business, investment or family: (1) An ownership or investment interest in any entity with which the Corporation has a transaction or arrangement or is negotiating a transaction or arrangement, or (2) A compensation arrangement with the Corporation or with any entity or individual with which the Corporation has a transaction or arrangement or is negotiating a transaction or arrangement, or (3) A potential ownership or investment interest in, or compensation arrangement with, any entity or individual with which the Corporation is negotiating a transaction or arrangement. Compensation includes direct and indirect remuneration as well as gifts or favors that are substantial in nature, as determined from time to time by the Board of Directors. A Financial Interest is not necessarily a conflict of interest. Under Section 14.3 below, a person who has a Financial Interest may have a conflict of interest only if the Board or committee decides that a conflict of interest exists.

14.3 Procedures.

(a) Duty to Disclose. In connection with any actual or possible conflicts of interest, an Interested Person must disclose the existence and nature of his or her Financial Interest and all material facts to the Directors and members of committees with Board delegated powers considering the proposed transaction or arrangement.

(b) Determining Whether a Conflict of Interest Exists. After disclosure of the Financial Interest, and all material facts, and after any discussion with the Interested Person, he or she shall leave the Board or committee meeting while the determination of a conflict of interest is discussed and voted upon. The remaining Board or committee members shall decide if a conflict of interest exists.

(c) Procedures for Addressing the Conflict of Interest.

1. An Interested Person may make a presentation at the Board or committee meeting, but after such presentation, he shall leave the meeting during the discussion of, and the vote on, the transaction or arrangement that results in the conflict of interest.
2. The President of the Board or chairperson of the committee shall, if appropriate, appoint a disinterested person or committee to investigate alternatives to the proposed transaction or arrangement.
3. After exercising due diligence, the Board or committee shall determine whether the Corporation can obtain a more advantageous transaction or arrangement with reasonable efforts from a person or entity that would not give rise to a conflict of interest.

If a more advantageous transaction or arrangement is not reasonably attainable under circumstances that would not give rise to a conflict of interest, the Board or committee shall determine by a majority vote of the disinterested Directors, even though the disinterested Directors may be less than a quorum, whether the transaction or arrangement is in the Corporation's best interest and for its own benefit and whether the transaction is fair and reasonable to the Corporation and shall make its decision as to whether to enter into the transaction or arrangement in conformity with such determination.

(d) Violation of the Conflicts of Interest Policy.

1. If the Board or committee has reasonable cause to believe that a Board or committee member has failed to disclose actual or possible conflicts of interest, it shall inform that Board or committee member of the basis for such belief and afford the person an opportunity to explain the alleged failure to disclose.

2. If, after hearing the response of the person and making such further investigation as may be warranted in the circumstances, the Board or committee determines that the person has in fact failed to disclose an actual or possible conflict of interest, it shall take appropriate disciplinary and corrective action.

(e) Duty to Abstain. When an individual Director, officer, or agent is deemed to have a real or apparent conflict, such individual shall, in addition to filing the disclosure notice required hereunder, abstain from making motions, voting, executing agreements, or taking any other similar direct or indirect action on behalf of the Corporation where the conflict might pertain, and shall not participate in the deliberation, debate or discussion of such matters except as may be specifically requested by the independent members of the Board of Directors.

ARTICLE 15
NON-DISCRIMINATION

Whenever reference in these Bylaws is made to the masculine pronoun, it should be construed as including both the masculine and feminine gender. In addition to its affairs and conduct of its business, the Corporation shall not discriminate as to any person on account of age, race, creed, color, sex, marital status, national origin, or handicap.

ARTICLE 16
DISPOSITION OF ASSETS UPON DISSOLUTION

16.1 No Director, officer or employee, member of a committee or person connected with the Corporation, or any other private individual, shall receive at any time any of the net earnings or pecuniary profit from the operations of the Corporation, provided that this shall not prevent the payment to any such person of such reasonable compensation as shall be fixed by the Board of Directors for services rendered to or for the Corporation in effecting any of its purposes; no such person or persons shall be entitled to share in a distribution of any of the corporate assets upon the dissolution of the Corporation. Unless otherwise compelled or required by law, dissolution of the Corporation in accordance with this Article 16 shall occur pursuant to a plan of dissolution adopted by three-fourths (3/4) of all of the Directors of the Corporation.

16.2 All Directors of the Corporation shall be deemed to have expressly considered and agreed that upon such dissolution or winding up of the affairs of the Corporation, whether voluntary or involuntary, the Directors shall, after paying or making provision for payment of all of the

liabilities of the Corporation, dispose of all of the assets of the Corporation exclusively to or for the benefit of an organization organized and operated exclusively for the support of the mechanical contracting industry and qualified as an exempt organization under Section 501(c)(6) of the Code. Any such assets not so disposed shall be disposed of by the Superior Court of [State] in the County in which the principal office of the Corporation is then located, exclusively for such purposes or to such organizations as such Court shall determine, which are organized at the time and qualify as an exempt organization or organizations under Section 501(c)(6) of the Internal Revenue Code of 1986, as amended, or the corresponding provisions of any future United States Revenue law.

ARTICLE 17
CHARITABLE STATUS

Notwithstanding any other provisions of these Bylaws, no Director, officer or employee or representative of this Corporation shall take any action or carry on any activity by or on behalf of the Corporation not permitted to be taken or carried on by an organization exempt under Section 501(c)(6) of the Internal Revenue Code of 1986, as amended, and its Regulations as they now exist or as they may hereafter be amended.

ARTICLE 18
SEAL

The seal of the Corporation shall be circular in form and shall have inscribed on its face the word "Seal", the name of the Corporation and the year of its incorporation.

ARTICLE 19
FORCE AND EFFECT

These Bylaws are subject to the provisions of the [State] Not-for-Profit Corporation Act (the "Act") and the Certificate of Incorporation as they may be amended from time-to-time. If any provision of these Bylaws is inconsistent with a provision of the Act or Certificate of Incorporation, the provision of the Act or the Certificate of Incorporation shall govern to the extent of such inconsistency.

Adopted and Approved on: _____

Appendix 4 -- Agreement between Industry Improvement Fund and Association for Administrative Services

AGREEMENT FOR ADMINISTRATIVE SERVICES BETWEEN
_____ INDUSTRY IMPROVEMENT FUND
AND
_____ CONTRACTORS ASSOCIATION

This AGREEMENT made on the _____ day of _____, 2008, is entered into by and between the _____ Industry Improvement Fund, (hereinafter referred to as "Industry Improvement Fund"), whose principal place of business and mailing address is 111 Jones Avenue, Anywhere, [STATE] 00000, and _____ Association, (hereinafter referred to as "Association"), whose principal place of business and mailing address is 111 Jones Avenue, Anywhere, [STATE] 00000.

RECITALS

WHEREAS, Industry Improvement Fund is a not-for-profit corporation of the State of _____ established to promote all phases of the plumbing industry and to foster protection of the public health and is qualified as exempt from income taxation under Section 501(c)(6) of the Internal Revenue Code; and

WHEREAS, the Association is a not-for-profit corporation of the State of _____ established as a membership organization to also promote all phases of the plumbing industry and to foster protection of the public health and is qualified as exempt from income taxation under Section 501(c)(6) of the Internal Revenue Code; and

WHEREAS, the Association is a well-established organization with an administrative staff with the experience and expertise to conduct all aspects of the operations of the Industry Improvement Fund; and

WHEREAS, the Industry Improvement Fund desires to contract with the Association to provide the Industry Improvement Fund with certain administrative services as more particularly described in this Agreement; and

WHEREAS, the Association desires to provide such services to the Industry Improvement Fund under the terms and conditions contained in this Agreement;

NOW, THEREFORE, BE IT RESOLVED, in consideration of the mutual covenants and agreements contained in this Agreement, the Industry Improvement Fund and Association agree as follows:

WITNESSETH

1. Services to be Provided.

During the term of this Agreement, Association will provide to Industry Improvement Fund the General Operational, Collective Bargaining, Industry Relations, Marketing, Advertising, Consumer, Legislative, Lobbying, Accounting, and other services as are more fully described and set forth on Schedule A attached hereto (such services being referred to collectively herein as the "Administrative Services"). The Administrative Services shall be provided in the same time and manner as Association provides for its own business, in material compliance with all applicable laws, rules and regulations, in accordance with applicable industry standards for those providing similar services and to the full extent necessary to allow Industry Improvement Fund to transact its business.

2. Payments to Association.

Industry Improvement Fund agrees to pay Association a fee of $___ per month for the Administrative Services, on the first day of each month during the term of this Agreement. Industry Improvement Fund also agrees to reimburse Association for any out-of-pocket expenses paid by Association to a third party on behalf of Industry Improvement Fund, within 30 days after receiving an invoice from Association for that payment.

3. Industry Improvement Fund's Responsibilities.

In connection with the Administrative Services provided by Association hereunder, Industry Improvement Fund will on a timely basis:

(a) Supply to Association such information and documents as are required by Association to perform the Services;

(b) Execute and promptly deliver to Association such documents and take such other action as is required to fulfill its corporate mission under its Articles of Incorporation, Bylaws, and the laws of the State of _____ and maintain its tax exempt status under Section 501(c)(6) of the Internal Revenue Code.

4. Confidentiality.

Except as otherwise provided in this Agreement, the parties hereto each agree that all information communicated to it by the other party hereto, whether before or after date hereof, shall be and was received in strict confidence, shall be used only for purposes of this Agreement and that no such material information shall be disclosed by the recipient party, its agents or employees without the prior written consent of the other party, except (i) as may be reasonably necessary by reason of legal, accounting or regulatory requirements, (ii) to the extent already a matter of public knowledge, (iii) to potential lenders or professional advisors; (iv) to the extent such information is provided to Association by a third party without restriction on disclosures and without breach by such third party of any non-disclosure obligation. The provisions of this Section shall survive termination of this Agreement for any reason. Nothing in this Section shall in any way limit any provisions relating to confidentiality set forth in any other contract or agreements between the parties hereto.

5. Relationship of Parties.

Association, in performing services hereunder, is acting only as an independent contractor. Association has the sole right and obligation to supervise, manage and direct all personnel in the performance of all work by the Association hereunder.

6. Limitation of Liability.

Association may rely on information reasonably believed by it to be accurate and reliable. Neither Association nor its officers, directors, employees, agents, control persons or affiliates (collectively, the *"Association's Employees")* shall be subject to any liability for, or any damages, expenses or losses incurred by the Industry Improvement Fund in connection with, any error of judgment, mistake of law, any act or omission in connection with or arising out of any services rendered under or payments made pursuant to this Agreement or any other matter to which this Agreement relates, except by reason of willful misconduct, bad faith or gross negligence on the part of any such persons in the performance of the duties of Association under this Agreement or by reason of reckless disregard by any of such persons of the obligations and duties of Association under this Agreement. Any person, even though also a director, officer, employee or agent of the Association, who may be or become a director, officer, employee or agent of the Industry Improvement Fund, shall be deemed, when rendering services to the Industry Improvement Fund or acting on any business of the Industry Improvement Fund (other than services or business in connection with the Association's duties hereunder), to be rendering such services to or acting solely for the Industry Improvement Fund and not as a director, officer, employee or agent, or under the control or direction of the Association.

7. Indemnification.

Industry Improvement Fund shall indemnify and hold harmless Association, and its officers, directors, employees and agents, from and against any claim, loss, liability or damage (including attorneys' fees incurred by it in connection with the defense of any action based on any such alleged act or omission) incurred by reason of an act performed, or omitted to be performed, by it in good faith on behalf of the Industry Improvement Fund and in a manner reasonably believed by Association to be within the scope of the authority conferred upon Association by this Agreement and in the best interests of the Industry Improvement Fund, provided that such indemnification is not prohibited by law or the act or omission does not amount to gross negligence, willful misconduct or bad faith. Association shall specifically be indemnified and held harmless from any and all actions taken in good faith and in reasonable reliance on advise of Industry Improvement Fund's attorney(s) or accountant(s) or at the direction of Industry Improvement Fund's officers or directors.

8. Insurance.

Industry Improvement Fund and Association shall each maintain a policy of comprehensive general liability insurance of at least $_____ in coverage, and such other bonding and liability insurance, including but not limited to professional errors and omissions insurance, directors' and officers' liability insurance, and unemployment and workers' compensation insurance, required by law or usual and customary with respect to the conduct of their activities, in amounts that they have determined are reasonably adequate. Each party shall name the other party as an additional insured if such coverage is available.

9. Inspections.

At all reasonable times, Association shall permit an authorized representative of Industry Improvement Fund to inspect, audit, and make copies of all books, records, summaries, reports, charts, graphs, tables, recommendations, and other documents and materials, as available, produced in whole or in part under this Agreement.

At all reasonable times, Industry Improvement Fund shall permit an authorized representative of Association to inspect, audit, and make copies of all books, records, summaries, report, charts, graphs, tables, recommendations, and other documents and materials, as available, produced in whole or in part under this Agreement.

10. Further Assurance.

From time to time, each party will execute and deliver such further instruments and will take such further action as any other party reasonably requests in order to discharge and perform the obligations and agreements hereunder.

11. Subcontracts and Assignments.

Association shall not subcontract, assign, or transfer any interest in all or any part of the services to be performed under this Agreement without the prior written consent and approval of Industry Improvement Fund. This Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors and permitted assigns.

12. Severability.

If any term, provision, covenant or condition of this Agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remainder of the provisions hereof shall remain in full force and effect and shall in no way be affected, impaired or invalidated.

13. Applicable Law.

This Agreement shall be governed by, construed and enforced in accordance with the laws of the State of _____, excluding, any conflicts-of-law rule or principle that might refer the construction or interpretation of this Agreement to the laws of another state.

14. Notices.

All notices, request, demands and other communications which are required or permitted to be given under this Agreement shall be in writing addressed as follows:

a. If to Association to:

_____ Association
111 Jones Avenue
Anywhere, [STATE] 00000
Phone
Fax
Email

2. If to Industry Improvement Fund to:

_____ Industry Improvement Fund
111 Jones Avenue
Anywhere, [STATE] 00000
Phone
Fax
Email

Any notice, instruction or other instrument required or permitted to be delivered hereunder by either party hereto to the other party shall be in writing and shall be delivered (i) personally (in which case such notice shall be deemed effective upon receipt) or (ii) mailed by certified mail,

postage prepaid, return receipt requested, to the appropriate address set forth above (in which case such notice shall be effective on the third business day after mailing), or by (iii) overnight delivery service to the appropriate address set forth above (in which case such notice shall be deemed effective on the following business day after mailing) or confirmed facsimile (in which case such notices shall be effective upon confirmation).

15. Entire Agreement and Amendment.

This Agreement sets forth the entire understanding and agreement between the parties hereto with respect to the subject matter hereof and supersedes all prior written or oral agreements and all contemporaneous oral agreements with respect to the subject matter hereof. This Agreement can be amended, supplemented or changed, and any provision hereof can be waived, only by written instrument making specific reference to this Agreement, signed by both parties. No delay or omission by any party hereto in exercising any right or power hereunder shall impair such right or power or be construed to be a waiver thereof. A waiver by any of the parties hereto of any of the covenants to be performed by any other party hereto or any breach thereof shall not be construed to be a waiver of any succeeding breach thereof or of any other covenant herein contained. All remedies provided for in this Agreement shall be cumulative and in addition to and not in lieu of any other remedies available to any party at law, in equity or otherwise.

16. Termination.

This Agreement shall terminate on the 90th day following written notice by either party to the other of its desire to terminate the Agreement. The parties acknowledge and agree that the termination of this Agreement shall not release any party from liability for its own misrepresentations or from any breach of any covenant, agreement or warranty contained herein occurring prior to such termination.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date and year first above written.

Witness:

_____

_____ Industry Fund

By: _____

Name: _____
Title: _____

_____ Association

_____ By: _____

Name: _____
Title: _____

Schedule A

Association will supply appropriate personnel with experience and expertise, equipment (including computer hardware and software) and business premises to provide the following services for the Industry Improvement Fund.

General Operational Services

(A) Corporate Formalities

- Maintenance of Corporation's records, reports and files
- Calendaring of required member, board and committee meetings
- Preparation and transmittal of notice for all meetings
- Arrangement of facilities for member, board and committee meetings
- Secretarial support for member, board and committee meetings
- Preparation and maintenance of meeting minutes of all member, board and committee meetings
- Assistance with selection of candidates for the board and committees of the board

(B) Accounting

- Maintenance of Corporate accounting records including reconciliations of all bank and other financial institution statements
- Collection of contributions and other accounts receivable of the Corporation
- Review and payment of accounts payable and other liabilities of the Corporation
- Investment and monitoring of financial reserves
- Recruitment of and assistance to outside accounting professionals including certified public accountants
- Preparation of and/or assistance with respect to all quarterly, semi-annual and annual State and Federal corporate tax returns, including subsequent inquiry or audit of current and prior returns
- Preparation and/or assistance in audit by Internal Revenue Service or State of _____ as to qualification for tax exempt status

(C) Legal

- Recruitment of and assistance to outside legal professionals
- Monitor and review of State legislative and regulatory proposals to determine applicability to and impact on plumbing industry
- Assistance to legal professionals in all administrative proceedings and/or litigation involving the plumbing industry
- Investigate, obtain and maintain appropriate federal/state trademark and tradename protections
- Develop, foster and promote compliance with all laws, regulations and orders concerning affirmative action and equal opportunity for employment
- Solicit competing quotes for all appropriate insurance coverages, including public liability and errors and omissions
- Maintain, monitor and renew all existing insurance coverages

(D) Grant Administration

- Assistance with development of program goals, guidelines and a form of Request for Proposal ("RFP")
- Dissemination of RFP to target groups
- Receive and screen all proposals
- Preparation of a summary grid of proposals for review and decision by the Corporation's board, committee or officers
- Prepare and send responses to applicants
- Disbursement of grants with grant letters
- Monitor performance of grantees
- Receive and review interim and annual reports from grantees

Collective Bargaining and Industry Relations Services

- Foster and promote employer/employee relationships to obtain optimum efficiency and workmanship in construction methods
- Maintenance of Corporation's collective bargaining records, reports and files
- Arrangement and calendaring of all collective bargaining meetings with local unions in the plumbing industry or affiliated unions in the construction industry
- Preparation and transmittal of notice for all meetings
- Arrangements for facilities for all collective bargaining meetings
- Preparation, review and publication of all collective bargaining agreements
- Assistance in the defense or prosecution of all grievances and industry issues with the local unions in the plumbing industry
- Participation and advocacy on behalf of the plumbing industry with all related industry participants, including local unions, trade associations, advocacy groups, owners (industrial, commercial and residential), general contractors and subcontractors
- Attendance at all meetings of industry related groups

- Arranging and calendaring of all meetings of industry related groups
- Preparation and transmittal of notice for all meetings
- Arrangements for facilities for all meetings

Marketing and Advertising Services

- Develop and engage in public relations programs designed to create a better public understanding of the plumbing industry and to encourage greater use of the industry's services by owners and construction and service purchasers for the benefit of the general public
- Preparation and review of all marketing materials
- Preparation and review of all advertising materials
- Solicitation and negotiation of all television, radio and print marketing and advertising contracts
- Review and monitor performance under all television, radio and print marketing and advertising contracts
- Solicitation, negotiation and assistance to all marketing and advertising firms including review and approval of all marketing and advertising materials
- Provide and monitor mailing and delivery of all marketing and advertising materials
- Preparation and maintenance of all web based advertising and information services for the plumbing industry
- Develop or participate in recruitment programs for the plumbing industry for a skilled workforce or contractor career

Legislative and Regulatory Services

- Represent the plumbing industry and cooperate with public officials and representatives of other organizations on all matters of mutual interest affecting the construction industry
- Review and monitor all proposed legislation and regulations regarding the plumbing industry
- Advocate and lobby for or against proposed legislation and regulations
- Solicit, review and contract with qualified advocacy/lobbying firms to act in the interest of the plumbing industry
- Through appropriate avenues, inform and educate the members of the plumbing industry and public of proposed or passed legislation and regulations regarding the plumbing industry
- Develop and promote safety in the plumbing contracting industry by developing programs and activities directed at assisting, technically or otherwise, architects, engineers, specification writers, general contractors, and governmental authorities and agencies, in the formulation or improvement of federal, state, and municipal regulations and other technical and safety programs having as their object the safe,

adequate and improved quality of plumbing contractors' service to the public.

General Educational Services

- Solicit member, contributing contractor and plumbing industry input on educational services
- Develop general educational program with specific courses and training appropriate for professional growth in the plumbing industry for supervisory and managerial personnel
- Solicit and contract qualified speakers for general educational services
- Develop specific educational programs appropriate for the plumbing industry to obtain or maintain professional licenses, certifications or registrations
- Obtain all federal, state and local approvals or certifications to conduct required educational courses to obtain or maintain professional licenses, certifications or registrations associated with the plumbing industry
- Solicit qualified speakers for required educational courses to obtain or maintain professional license, certifications or registration associated with the plumbing industry
- Preparation and transmittal of all advertising and notices relating to all educational courses
- Provide facilities appropriate for educational course
- Coordinate and monitor all general and required educational courses
- Solicit and obtain all post-educational course comments from attending members and contributing contractors
- Develop and promote research and experimentation concerned with improving existing construction methods and developing, testing and promoting new construction materials and/or modes of construction

Appendix 5 -- Proposed Antitrust Guidelines

INDUSTRY IMPROVEMENT FUNDS OPERATION GUIDE ANTITRUST COMPLIANCE GUIDE[24]

While generalizations are difficult, most antitrust compliance programs for trade associations and Industry Improvement Funds should contain some or all of the following elements:

1. *General Operating Procedures*

   a. *Policy Statement*. The association and Industry Improvement Fund's board of directors or other governing body should adopt a written statement confirming that it is their policy to comply fully with federal and state antitrust laws. The statement must be clear, concise, and strongly worded. It should identify the officials within the organizations who are primarily responsible for administering the compliance program and to whom specific questions can be directed. The statement should leave no doubt in the minds of the staffs or their members that antitrust compliance is a priority.

   b. *Education*. Employees must be educated in the basic concepts of antitrust and told, in practical terms, why compliance with the law is important in their day-to-day activities. After a general antitrust orientation session, and if the size of the staff warrants it, smaller group discussions offer an effective means for reviewing problems which group members are likely to confront in their particular areas of responsibility. Special problem areas disclosed in the audit and corrective measures for the future can also be considered in group meetings.

   c. *Agendas*. A detailed agenda should be prepared for each meeting of the association and Industry Improvement Fund. If warranted by staff it may be reviewed in advance by legal counsel for antitrust implications.

   d. *Meetings*. Legal counsel should be present at all member and Board of Directors meetings, and at any other meetings at which antitrust-sensitive issues are discussed.

   e. *Minutes*. Accurate minutes must be kept for all association and Industry Improvement Fund meetings. They should demonstrate sensitivity by members and staff to the antitrust laws. Minutes should never be incomplete or *doctored*. All minutes should be approved by counsel before adoption.

   f. *Informal Sessions*. Informal gatherings which precede or follow association and Industry Improvement Fund meetings are looked upon with great suspicion by antitrust enforcement agencies. All meetings should be regularly scheduled and no informal sessions should be held in lieu of formal meetings.

[24] Antitrust Advisor, §11:54 (Irving Sher, ed. 2007)

2. Membership Policies

When adopting and implementing membership policies, trade associations should avoid:

a. Excluding certain competitors from membership in the association, especially if there is an arguable business advantage in being a member.
b. Imposing restrictions on dealings by members with nonmembers.
c. Limiting access to information developed by the association (unless such a limitation is firmly grounded on the need to protect trade secrets).

3. Self Regulation

Measures for industry self-regulation and code of ethics should avoid:

a. Adopting regulations or policies which have price fixing implications or which unreasonably restrict the ability of any member or group of members to compete.
b. Requiring members of the association to refrain from dealing with a member who has violated the association's code of ethics.
c. Enforcing a code of ethics arbitrarily.
d. Imposing unreasonably severe penalties for violation of a code of ethics.

4. Association and Industry Improvement Fund Meetings

Certain topics of discussion must be avoided at all association and Industry Improvement Fund meetings. These include:

a. Current or future prices (great care must be taken in discussing past prices).
b. What constitutes a fair profit level.
c. Possible increases or decreases in prices.
d. Standardizing or stabilizing prices.
e. Pricing procedures.
f. Cash discounts.
g. Credit terms.
h. Control of sales.
i. Allocation of markets or customers.
j. Refusals to deal with a company because of its pricing or distribution practices.
k. Whether or not the pricing practices of any industry member are unethical or constitute an unfair trade practice.

The association and Industry Improvement Fund's antitrust guidelines should not only

outline the basic provisions of the antitrust laws, but should also explain, in detail, how the antitrust laws apply to the business practices of the industry that they represent.

A copy of the organization's guidelines should be given to all key employees. Copies should be numbered, if possible, and each employee should return a signed acknowledgment indicating that the employee:

1. Has read the guidelines;
2. Understands the guidelines;
3. Will obey the guidelines;
4. Knows whom to contact in the event that any questions about antitrust compliance arise;
5. Understands that a violation of the association's antitrust guidelines may result in discharge.

Consideration should be given to distributing the antitrust guidelines to members of the association and told that a deliberate violation is cause for expulsion from the association.

5. *Dealing with an FTC or Antitrust Division Investigation*

An antitrust compliance program should provide association and Industry Improvement Fund personnel with some general information regarding how the Antitrust Division of the United States Department of Justice and the Federal Trade Commission conduct investigations. The program must include specific instructions of what to do in the event that an FTC investigator or FBI agent arrives at the organization's offices.

Among the points which should be covered in this portion of the compliance program are the following:

a. Every trade association office should have specific individuals assigned the *exclusive* responsibility of dealing with all investigators.
b. No investigator without compulsory process should be allowed to interview any employees or examine any files.
c. If the investigator claims to have a subpoena or a Civil Investigative Demand (CID), immediately call counsel and obtain counsel's advice before giving the investigator access.
d. If the investigator does not have a subpoena or a CID, ask what specific information he or she is looking for and why. Then advise the investigator to write a letter to the association's executive officer explaining what information is wanted. Inform the investigator that the executive officer will go over the request with counsel and then respond.
e. Review the investigator's request with counsel, and only after developing a plan for

responding to the complete investigation should you begin to take action.

6. *Counsel*

The effectiveness of any compliance program depends to a great extent on the efforts of the association's management to identify issues and problems and their willingness to consult counsel when the need arises. Even with a comprehensive compliance program, problems can and do occur which require an antitrust attorney's input and guidance. Association management should be encouraged to seek such advise and to establish a regular dialogue with the association's attorney to familiarize him or her with new developments in the association and in the industry as a whole. Counsel, of course, should be consulted before changes of any nature are made in the compliance program.

7. *Record Retention*.

Accurate, contemporaneous records should be made concerning association and Industry Improvement Fund programs, meetings, review of membership applications, membership or industry standards, and any other matters with potential antitrust significance. As employees retire and memories fade, these records will provide perhaps the only source of evidence for determining the basis for actions taken and decisions made in the past. There are no fixed rules on how long other documents should be retained. Some will be needed longer than others. Whatever the retention period, no documents should be destroyed except in accordance with a written record retention policy. This policy should also assure that no individual document is permanently removed from a file without proper authorization or altered in any respect. Scrupulous compliance with a reasonable record retention policy is the best defense to charges that evidence has been manufactured or destroyed for ulterior reasons.

Appendix 6 – Sample Attachements to the IRS 990 Form

INDUSTRY IMPROVEMENT FUND
BOARD OF DIRECTORS
CONFLICT OF INTEREST

Name: _____

Home Address: _____

Business Address: _____

Profession, Employment, Expertise: _____

8. Do you have or have you had in the past 12 months any direct or indirect interest in a business, financial or professional concern with which the Industry Improvement Fund is considering entering into or has entered into a contract, or a trade, grant or other professional relationship?

   A "direct interest" refers to your interest as a sole proprietor, holder (beneficially or of record) of 10% or more of the outstanding shares, fiduciary, partner, joint venturer or employee. An "indirect interest" refers to situations where a direct interest is held by a member of your immediate family – parent, spouse, child, sibling.

   No: _____ Yes: _____

   If yes, details of the interest are set forth below, including, to the extent applicable, (i) the nature of the interest, (ii) position held or affiliation giving rise to the interest, (iii) period of employment, affiliation or relationship, and (iv) compensation or consideration received or to be received from the Industry Improvement Fund.

9. Do you have any business, financial or professional relationship with any member of the staff of the Industry Improvement Fund?

   No: _____ Yes: _____

If "yes" to question 1 and/or question 2, details are:

_____

_____

_____ _____

Signature **Date**