

**NATIONAL ELEVATOR INDUSTRY PENSION PLAN  
NATIONAL ELEVATOR INDUSTRY HEALTH BENEFIT PLAN AND  
ELEVATOR CONSTRUCTORS ANNUITY AND 401(k) RETIREMENT PLAN  
PROCEDURES FOR PROCESSING EMPLOYER APPEALS OF PAYROLL AUDITS AND  
REQUESTS FOR REFUNDS, CREDITS AND OFFSETS OF ERRONEOUS EMPLOYER CONTRIBUTIONS**

**Introduction**

In accordance with the Restated Agreement and Declaration of Trust of the National Elevator Industry Pension Plan, as amended, the Restated Agreement and Declaration of Trust of the National Elevator Industry Health Benefit Plan, as amended, and the Restated Trust Agreement for the Elevator Constructors Annuity and 401(k) Retirement Plan, as amended (collectively, “Funds’ Trust Agreements”), the Boards of Trustees of the National Elevator Industry Pension Plan, National Elevator Industry Health Benefit Plan and the Elevator Constructors Annuity and 401(k) Retirement Plan (collectively, the “Trustees”), in coordination with the Boards of Trustees of the National Elevator Industry Educational Program and the Elevator Industry Work Preservation Fund, have adopted *Guidelines for Employers Participating in the National Elevator Industry Pension Plan, the National Elevator Industry Health Benefit Plan, the National Elevator Industry Educational Program, the Elevator Constructors Annuity and 401(k) Retirement Plan and the Elevator Industry Work Preservation Fund* (“Employer Guidelines”). In addition, the Trustees have adopted *Guidelines for IUEC Local Unions Participating in the National Elevator Industry Pension Plan, the National Elevator Industry Health Benefit Plan, and the Elevator Constructors Annuity and 401(k) Retirement Plan Pursuant to Participation Agreements* (“Guidelines for Local Unions”).

Among other things, the Employer Guidelines and the Guidelines for Local Unions set forth rules regulating the remittance of contributions employers are required to make to the National Elevator Industry Pension Plan (“Pension Plan”), National Elevator Industry Health Benefit Plan (“Health Benefit Plan”) and Elevator Constructors Annuity and 401(k) Retirement Plan (“Annuity 401(k) Plan”) (collectively, the “Plans”) on behalf of their employees covered by Collective Bargaining Agreements with the IUEC or Participation Agreements with the Trustees. While contribution rates are established by Collective Bargaining Agreement or Participation Agreement, the payment of contributions by employers must be in accordance with the terms of the Funds’ Trust Agreements and the rules promulgated by the Trustees thereunder.

**Employer Audit Appeals**

Article IX of the Employer Guidelines (Article X of the Guidelines for Local Unions) sets forth the procedures for Employer Appeals of Payroll Audits. In accordance with these procedures, an Employer may file an appeal with the Trustees of the findings of the Fund Auditor as detailed in a payroll audit report.

**Employer Requests for Refunds, Credits or Offsets of Erroneous Contributions**

Article X of the Employer Guidelines (Article XI of the Guidelines for Local Unions) sets forth the Trustees’ rules concerning the refund of erroneous employer contributions. In accordance with these rules, the Trustees may *consider* an Employer’s request for a refund, credit or offset of mistaken contributions under two general circumstances:

1. One Year Rule. Where the Trustees receive a written request for a refund, credit or offset of mistaken contributions within one year after payment of said contributions; and
2. Payroll Audit Period Rule. Where such mistaken contributions were made by the Employer during an Employer’s payroll audit period, and such erroneous contributions were first identified during the payroll audit and only if the Trustees receive from the Employer a written request for the refund, credit or offset of mistaken contributions within 60 days after the Employer’s receipt of the findings of the payroll audit.

To the extent permitted by ERISA and the Internal Revenue Code, the Trustees of each Plan have complete discretion to determine whether all or a portion of erroneous contributions to the Plan may be: (a) refunded back to the Employer; (b) treated as a credit against the Employer's contribution obligations to the Plan, or (c) be used to offset a delinquent Employer's obligation to make additional contributions to the Plan. However, certain limitations are placed on any refund, credit or offset as follows:

1. Any refund, credit or offset of an erroneous contribution will be without interest.
2. A Plan's costs and expenses related to the Employer's payment of erroneous contributions should be deducted from any refund where reasonably determinable. These deductions will include:
  - the administrative costs of correcting the mistake,
  - any uncollected benefits paid in reliance on the erroneous contributions, or the cost of collecting such benefits,
  - the expenses of any litigation resulting from the adjustment of any Employees' medical or pension eligibility to reflect the refunded contributions,
  - all other costs and losses to the Plan attributable to the erroneous contributions, and
  - if the erroneous contributions were first identified during a payroll audit, any refund of erroneous contributions will be reduced by the cost of the payroll audit if the Employer is found to have had underreported contributions during the payroll audit period and the amount of underreported contributions, *without regard to the Employer's erroneous contributions*, would have required the Employer to pay the cost of such payroll audit.

### **Purpose of These Procedures**

These procedures are intended to promote efficient processing of Employer Audit Appeals and Employer requests for refunds, credits and offsets of erroneous contributions, and to ensure the Plans' Trustees<sup>1</sup> render determinations regarding Employer Audit Appeals and Employer requests for refunds, credits or offsets of erroneous contributions in a consistent manner that is in accordance with the Funds' Trust Agreements, the Employer Guidelines or Guidelines for Local Unions, other governing plan documents and applicable federal law.

### **Note Regarding Trustees' Consideration of Employer Audit Appeals and Employer Requests for Refunds, Credits and Offsets of Erroneous Contributions**

In many cases, an Employer's appeal of the findings of a Payroll Audit and an Employer's request for refund, credit or offset of erroneous contributions can be resolved by a Plan's Trustees at the same time. Accordingly, these procedures contemplate that the Trustee consideration of Employer Audit Appeals and Employer requests for refund, credit or offset of erroneous contributions will be conducted together at each regularly scheduled Trustees meeting.

### **Other Considerations**

These procedures are part of a larger set of rules and regulations that have been adopted by the Trustees to effect the contribution provisions of the Funds' Trust Agreements, collective bargaining agreements and participation agreements. Accordingly, these procedures are intended to be consistent with these other rules and regulations and, in many respects, will also serve to promote the effective collection of contributions and the aid in monitoring of Employer compliance.

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<sup>1</sup> Or, the Benefits Office, in those cases that involve erroneous overpayments that are solely the result of an Employer's arithmetical or clerical errors (see page 8 below).

## PROCEDURES FOR PROCESSING EMPLOYER APPEALS OF PAYROLL AUDITS AND REQUESTS FOR REFUNDS, CREDITS AND OFFSETS OF ERRONEOUS EMPLOYER CONTRIBUTIONS

### STEP 1: FUND AUDITOR'S ROLE PRIOR TO ISSUING PAYROLL AUDIT REPORTS.

- See Also, *Payroll Audit Guidelines for the National Elevator Industry Pension Fund, the National Elevator Industry Health Benefit Plan, the Elevator Constructors Annuity and 401(k) Retirement Plan, the National Elevator Industry Educational Program and the Elevator Industry Work Preservation Fund ("Payroll Audit Guidelines")* and the exhibits to the Payroll Audit Guidelines (*i.e.*, the respective procedures for performing payroll audits for: (1) Employers other than Large Employers and Local Unions and other organizations; (2) "Large Employers" and (3) of Local Unions and other contributing organizations).
- To promote efficient processing of Employer Appeals, Employer requests for refund, credit or offset of erroneous contributions, and to assist the Benefits Office and Fund Collection Counsel to respond to other significant issues that may be identified during a payroll audit, the Fund Auditor is encouraged to notify by email designated Benefits Office personnel and Fund Collection Counsel of certain significant issues including:
  - Participation by Non-Grandfathered Employees including "Non-Eligible Employees" as defined in Article VI of the Employer Guidelines.
  - Contributions made on behalf of ineligible individuals (*e.g.*, sole proprietors or partners and 1099 independent contractors).
  - Contributing Employer not in the Elevator Industry.
  - Potential significant violations of the Collective Bargaining Agreement (*e.g.*, evidence of non-signatory alter ego)
- Benefits Office Contacts (as of 9/1/2015): Heather Whitman, JAnne Connolly and Jeff Meitzler.
- Fund Collection Counsel (as of 9/1/2015): Andrew Kelser (copies to John McIntire and David Capuano)
- Communications between Fund Auditor, Benefits Office and Fund Collection Counsel relating to significant issues identified during Payroll Audit:
  - Upon notification by the Auditor of a significant issue identified on audit, Fund Collection Counsel will follow up with Auditor to assess the matter.
  - In the event Fund Collection Counsel determines special steps should be taken, Fund Collection Counsel will promptly notify the Chairman and Co-Chairman of the Pension Plan and the Health Benefit Plan of the issues and provide a recommendation regarding follow up actions.
  - (See also, Section VI.1 of Payroll Audit Guidelines)

### STEP 2: RECEIPT OF PAYROLL AUDIT REPORTS BY BENEFITS OFFICE AND FUND COLLECTION COUNSEL.

- The Payroll Audit Guidelines provide that the Fund Auditor will submit copies of recently completed Payroll Audit Reports to the Benefits Office, the Trustees and Fund Collection counsel every other month (which generally describes current practice). The Payroll Audit Guidelines further provide that in the event circumstances warrant, the Auditor will submit a Payroll Audit Report to the Benefits

Office, Fund Collection Counsel and the Trustees as soon as possible after completion of the Payroll Audit, but in no case later than two weeks after completion of such Payroll Audit. See Section VI.2 of Payroll Audit Guidelines.

- ***Benefits Office and Fund Collection Counsel Review of Payroll Audit Reports.***

Promptly upon receipt of Payroll Audit Reports, designated Benefits Office personnel and Fund Collection Counsel will review Payroll Audit Reports. Special notice will be directed to the following:

1. ***Benefits Office and Fund Collection Counsel*** will determine whether a Payroll Audit Report identifies over-reported hours/erroneous overpayments to the Plans, and if so—
  - a) Whether the Employer is signatory to a collective bargaining agreement or participation agreement;
  - b) Whether over-reported hours/erroneous overpayments to the Plans relate to Owners or Relatives of Owners;
  - c) If Employer also has underreported hours/additional contributions owing, whether an Employer's additional contributions owing exceed 5% of the contributions made by the Employer during the audit period.
2. ***Benefits Office personnel*** will also review Payroll Audit Report with over-reported hours/erroneous overpayments to determine:
  - a) Pension Plan: Whether a currently retired participant had over-reported hours taken into account when determining pension amount or eligibility for a certain pension type (e.g., Early Retirement Pension);
  - b) Pension Plan: Whether any employee with over-reported hours has a Pension Application pending with the Benefits Office;
  - c) Annuity 401(k) Plan: Whether a participant has received a distribution from the Annuity 401(k) Plan that took into account erroneous overpayments;
  - d) Annuity 401(k) Plan: Whether an employee credited with erroneous overpayments has an Application for Distribution pending with the Annuity 401(k) Plan;
  - e) Health Benefit Plan: Whether a participant maintained or established eligibility (as an Active Member or retiree) under the Health Benefit Plan on account of over-reported hours/erroneous overpayments.

- ***Benefits Office Actions upon Review***

1. After initial review of Payroll Audit Reports, the Benefits Office will prepare a single report identifying any incidents described in 2 above. This report will be provided to:
  - a) Fund Collection Counsel (email to Andrew Kelsner with copies to John McIntire and David Capuano), and
  - b) Director, Pension and Eligibility Operations (James Govannicci) with copies to the Executive Director (Robert Betts), Director of Finance (Anne Connolly) and other designated Benefits Office personnel.
2. The Benefits Office will take the following actions relating to its findings listed in 2 above:

- a) Pension Plan: If a currently retired participant had over-reported hours taken into account when determining pension amount or eligibility for a certain pension type (e.g., Early Retirement Pension): **Report finding only.**
  - b) Pension Plan: If employee with over-reported hours has a Pension Application pending with the Benefits Office: **Confer with Counsel before processing Pension Application.**
  - c) Annuity 401(k) Plan: If a participant has received a distribution from the Annuity 401(k) Plan that took into account erroneous overpayments: **Report finding only.**
  - d) Annuity 401(k) Plan: If an employee who has been credited with erroneous overpayments has an Application for Distribution pending with the Annuity 401(k) Plan: **Confer with Counsel and effect a hold on that portion of the Participant's Annuity 401(k) account that is attributable to the erroneous overpayments.**
  - e) Health Benefit Plan: If a participant maintained or established eligibility (as an Active Member or retiree) under the Health Benefit Plan on account of over-reported hours/erroneous overpayments: **Confer with Counsel.**
- **Counsel Follow Up**

In general, Fund Collection Counsel will include recommendations to the Trustees in the "Counsel's Report on Erroneous Contributions" (see below). However, if certain matters need immediate action, Counsel may submit a recommendation to the Co-Chairs that immediate action should be taken. For example:

- a) Pension Plan. In the case of a pending Pension Plan application, Counsel may recommend that the Pension Department notify the Employee in writing that: (i) a Payroll Audit of his/her Employer indicates over-reporting of hours on the Employee's behalf; (ii) the amount of the Participant's pension benefit attributable to over-reported hours will be withheld from the Participant's pension benefit pending further investigation; and (iii) the Participant may appeal this action to the Pension Trustees.
- b) Annuity 401(k) Plan. In the case of a pending application for distribution from the Annuity 401(k) Plan, Counsel may recommend that the Benefits Office instruct MassMutual to withhold from the Employee's distribution the amount of erroneous contributions (including elective deferrals, if any) plus earnings thereon (but not take into account losses). The Benefits Office would notify the Employee in writing that: (i) a Payroll Audit of his/her Employer indicates that the Employer may have made erroneous contributions to the Annuity 401(k) Plan on the Employee's behalf; (ii) a hold will be placed on the portion of the Employee's account attributable to erroneous contribution pending further investigation; and (iii) the Employee may appeal this action.
- c) Health Benefit Plan. If a Participant maintained or established eligibility (as an Active Member or retiree) under the Health Benefit Plan on account of over-reported hours/erroneous overpayments, and continues to be eligible for benefits as a result of such over-reported hours/erroneous overpayments, Counsel may recommend that the Benefits Office notify the Participant in writing that: (i) a Payroll Audit of his/her Employer indicates that the Employer over-reported hours/remitted erroneous contributions to the Health Benefit Plan on the Participant's behalf; (ii) as a result, the Employee has been able to maintain his/her eligibility under the Plan in violation of the Plan's governing documents; (iii) effective immediately, Participant's (and dependents') eligibility for benefits is terminated; and (iv) the Participant may appeal this action.

- d) Health Benefit Plan. If it appears likely, based on the Employee's work history or other facts, that the Employee continues to maintain eligibility as an Active Member or, if now retired, established eligibility for retiree coverage through his or her Employer's practice of over-reporting for post-audit periods, Counsel may request the Chairman and Co-Chairman authorize a follow up payroll audit of the Employer for the relevant period.
- e) Non-Eligible Employees (under Employer Guidelines Article VI). If a Payroll Audit Report shows that an Employer remitted contributions on behalf of Non-Eligible Employees (as defined in Article VI of the Employer Guidelines):
  - The Director of Pension and Eligibility will review the matter with Counsel, and Counsel will include a recommendation in Counsel's Report on Erroneous Contributions consistent with Article VI of the Employer Guidelines; and
  - If Benefits Office records show the Employer continues to make contributions on behalf of Non-Eligible Employees the Employer and the Non-Eligible Employee will be notified immediately. The Employer will be instructed to cease making contributions on the Non-Eligible Employee's behalf and the Non-Eligible Employee will be advised that coverage under the Health Benefit Plan will be terminated as of the last day of the current calendar month. The Non-Eligible Employee will be given appeal rights.
- f) Employee not covered by CBA or Participation Agreement (other than a Non-Eligible Employee). If the Payroll Audit Report shows that an Employer made contributions on behalf of an employee who is not covered by the CBA or participation agreement (other than a Non-Eligible Employee), Counsel will include a recommendation in the Counsel's Report on Erroneous Contributions.
- g) Non-Employees. If a Payroll Audit Report shows that an Employer remitted contributions on behalf of a non-employee, the Benefits Office shall notify Counsel. Counsel will include a recommendation in the Counsel's Report on Erroneous Contributions. If Benefits Office records show the employer continues to make contributions on behalf of a Non-Employee, the Employer and Non-Employee will be notified immediately. The Employer will be instructed to cease making contributions on the non-employee's behalf and the non-employee will be advised that coverage under the Health Benefit Plan will be terminated immediately. The individual identified as a non-employee will be given appeal rights.

**STEP 3: EMPLOYER NOTIFICATION OF OVER-REPORTED CONTRIBUTIONS**

Regardless of whether a Payroll Audit Report shows over-reported contributions, a cover letter from the Benefits Office to the Employer will be included with the copy of the findings of the Payroll Audit mailed to the Employer. Among other things, these cover letters will reference the Employer Guidelines (or if applicable Local Union Employer Guidelines), the Plans' procedures for Employer appeals of Payroll Audit Reports and procedures regarding the refund, offset or crediting of erroneous contributions.

An Employer will receive one of four cover letters, depending on its circumstances:

- 1. MODEL PAYROLL AUDIT REPORT COVERLETTER (CBA EMPLOYER WITH UNDER-REPORTING) EXHIBIT A-1**
- 2. MODEL PAYROLL AUDIT REPORT COVERLETTER (CBA EMPLOYER WITH NO UNDER-REPORTING) EXHIBIT A-2**

**3. MODEL PAYROLL AUDIT REPORT COVERLETTER (LOCAL UNION WITH UNDER-REPORTING) EXHIBIT B-1**

**4. MODEL PAYROLL AUDIT REPORT COVERLETTER (LOCAL UNION WITH NO UNDER-REPORTING) EXHIBIT B-2**

Findings of Payroll Audits should be sent to Employers as expeditiously as possible upon the Benefits Office's receipt of the Payroll Audit Reports from the Auditor. ***The procedures described in STEP 1 and STEP 2 above are independent of and need not be coordinated with this STEP 3.***

**STEP 4: PROCESSING EMPLOYER REQUESTS FOR REFUND, CREDIT OR OFFSET OF ERRONEOUS OVERPAYMENTS**

**Requests must be made writing.**

Like Employer Audit Appeals, Employer requests for refund, credit or offset of erroneous contributions must be made in writing. If an Employer's Audit Appeal relates to a Payroll Audit that includes a finding of erroneous overpayments, the appeal will be treated as both an Employer Audit Appeal and a request for refund, credit or offset of erroneous contributions.

In the event an Employer requests a refund, credit or offset over the phone, the Benefits Office will advise the Employer that a request must be made in writing within 60 days of the Employer's receipt of the findings of the Payroll Audit.

Employers who contact the Benefits Office over the phone with general inquiries regarding their right to refunds, credits or offsets of erroneous contributions should be directed to the Employer Guidelines. They should also be advised that only the Trustees may authorize the refund, credit or offset of erroneous contributions.

**Timeliness of requests.**

Like Employer Audit Appeals, written Employer requests for refund, credit or offset of erroneous contributions must be made within 60 days of Employer's receipt of the findings of a Payroll Audit. Nevertheless, all written Employer requests, including untimely ones, must be presented to the Trustees.

If the Employer's request is untimely, the Benefits Office shall include a statement in the "Benefits Office Report on Erroneous Contributions" (see below) that the request was untimely and include the number of days late.

**Requests outside the scope of Payroll Audits.**

The Trustees or the Benefits Office also will consider a written request for a refund, credit, or offset of erroneous contributions if made by an Employer within one year after payment of the contributions.

▪ Benefits Office consideration of Employer requests for refund, credit or offset of erroneous contributions

In the event an Employer requests a refund, credit or offset of erroneous contributions outside the scope of Payroll Audits (*i.e.*, under the "One Year Rule") and the Benefits Office can verify that the Employer's overpayment of contributions is solely the result of an arithmetical or clerical error, the Benefits Office may make a determination regarding whether a refund, credit or offset

of erroneous contributions is appropriate. Such determinations shall be made in accordance with the policies and guidelines set forth in these procedures.

The Benefits Office should not adjudicate any Employer request for refund, credit or offset of erroneous contributions if such request raises any questions as to whether the Employer's overpayment is not solely the result of an arithmetical or clerical error and may not be a bona fide mistake of law or fact—for instance, if the Employer's submission of erroneous contributions appears to have been intentional and made on behalf of employees for whom contributions would not be required under the Collective Bargaining Agreement or Participation Agreement. In such cases, the Employer's request shall be processed as set forth below.

- Trustee consideration of Employer requests for refund, credit or offset of erroneous contributions

Except in cases where the Benefits Office can verify that the Employer's overpayment of contributions is solely the result of an arithmetical or clerical error as described above, Employer requests made under the Plans' "One Year Rule" shall be processed in the same manner as requests for refund, credit, or offset of erroneous contributions first identified during a payroll audit as described in this STEP 4. However, requests under the "One Year Rule" will be listed separately in the Benefits Office Report on Erroneous Contributions.

If the Employer's request is made over one year after the Employer paid the contributions, the Benefits Office shall include a statement in the Benefits Office Report on Erroneous Contributions that the request was untimely and the number of days, months or years late.

**Notifying Counsel of Employer requests for Refund, Credit or Offset of Erroneous Contributions.**

Unless special circumstances indicate Counsel should be notified immediately of an Employer's request for refund, credit or offset of erroneous contributions, all Employer requests for refund, credit or offset of erroneous contributions that will be considered by the Trustees at their upcoming meeting should be provided to Counsel in one emailing. The Employer's Payroll Audit Report will be included with each request (As of 9/1/2015, John McIntire, Andrew Kelser and Fred Singerman should receive the email with copies to David Capuano).

Generally, the Benefits Office must provide Counsel with all written Employer requests for refund, credit or offset of erroneous contributions that will be considered by the Trustees at their upcoming meeting at least 30 days prior to that meeting. Requests not provided to counsel at least 30 days prior to the upcoming meeting may be considered by the Trustees at the following Trustees meeting.

**Coordination with Employer Audit Appeals.**

Employer Audit Appeals that will be considered by the Trustees at their upcoming meeting should be provided to Counsel at the time the Benefits Office also provides Counsel with written Employer requests for refund, credit or offset. The Employer's Payroll Audit Report will be included with each appeal (As of 9/1/2015, John McIntire, David Capuano, Andrew Kelser (O'Donoghue) and Fred Singerman (Seyfarth) should receive this email).

**Timing of Trustee consideration of Employer requests for Refund/Credit/Offset or Over-Reported Contributions.**

Generally, written Employer requests for refund, credit or offset of erroneous contributions will be considered by the Trustees at the meeting that immediately follows the Benefits Office's receipt of the request, unless the request is received within 30 days preceding the date of such

meeting. In such case, the request will be considered by the Trustees at the second meeting that follows the Benefits Office's receipt of the request. If special circumstances require a further extension of time, the Benefits Office will notify the Employer in writing.

## STEP 5: BENEFITS OFFICE REPORT ON ERRONEOUS CONTRIBUTIONS

Prior to each Trustees Meeting, the Benefits Office will prepare a Benefits Office Report on Erroneous Contributions that will be included in the meeting materials of each regular meeting of the Boards of Trustees. The Benefits Office Report on Erroneous Contributions will have three (3) sections and attachments:

Section 1: Employer Requests for Refund, Credit or Offset of Erroneous Contributions Identified on Audit. This Section of the Report will include the following:

- Name of Employer
- Audit Period
- Amount of Overpayments (by Plan)
- **Only if applicable**, indicate:
  - The Employer's request is untimely;
  - The Employer's audit also shows underreported hours, and if so:
    - a breakdown of underreporting by Plan; and
    - whether the Employer has: (1) paid off all contribution amounts owed *exclusive of overpayments* (and date paid); or (2) paid off only a portion of contribution amounts owed (include date of payment and amount).
  - the Employer submitted a related Audit Appeal;
  - the Employer is currently delinquent for periods outside the Audit Period;
  - the Employer is currently subject to a settlement agreement with the Plans;
  - a lawsuit has been filed by the Trustees against the Employer for collection of delinquent contributions;
  - erroneous contributions were made on behalf of Owners or Relatives of Owners;
  - Employee(s) on whose behalf overpayments were made to the Pension Plan is retired;
  - Employee(s) on whose behalf overpayments were made to the Pension Plan has a pension application pending with the Benefits Office;
  - Employee(s) on whose behalf Employer overpayments or Elective Deferrals were made to the Annuity 401(k) Plan has received a distribution from the Annuity 401(k) Plan;
  - Employee(s) on whose behalf Employer overpayments or Elective Deferrals were made to the Annuity 401(k) Plan has an application pending for a distribution from the Annuity 401(k) Plan;
  - Employer overpayments or Elective Deferrals to the Annuity 401(k) Plan would be subject to forfeiture (*e.g.*, failure to provide Employee or Owner compensation information);
  - An Employee's eligibility under the Health Benefit Plan was established or maintained due to overpayments;

- A retiree's eligibility for coverage under the Health Benefit Plan was established due to erroneous overpayments;
  - Employer overpayments were made on behalf of a Non-Eligible Employee;
  - Employer overpayments were made on behalf of an employee not covered by the Employer's Collective Bargaining Agreement or Participation Agreement (other than a Non-eligible Employee);
  - Employer overpayments were made on behalf of non-employees; and
  - One or more of the Plans incurred investment losses during the period an Employer overpayment was held by the Plans.
- Additional comments if necessary.

Section 2: Employer Requests for Refund, Credit or Offset of Erroneous Contributions under One-Year Rule. This Section of the Report will include the following:

- Name of Employer
- Amount of Overpayments (by Plan)
- **Only if applicable**, indicate:
  - Employer's request is untimely;
  - Employer is currently delinquent;
  - Employer is currently subject to a settlement agreement with the Plans;
  - Overpayments were made on behalf of Owners or Relatives of Owners;
  - Employee(s) on whose behalf overpayments were made to the Pension Plan is retired;
  - Employee(s) on whose behalf overpayments were made to the Pension Plan has a pension application pending with the Benefits Office;
  - Employee(s) on whose behalf Employer overpayments or Elective Deferrals were made to the Annuity 401(k) Plan has received a distribution from the Annuity 401(k) Plan;
  - Employee(s) on whose behalf Employer overpayments or Elective Deferrals were made to the Annuity 401(k) Plan has an application pending for a distribution from the Annuity 401(k) Plan;
  - Employer overpayments or Elective Deferrals to the Annuity 401(k) Plan would be subject to forfeiture (e.g., failure to provide Employee or Owner compensation information);
  - An Employee's eligibility under the Health Benefit Plan was established or maintained due to over-reported hours/overpayments;
  - A retiree's eligibility for coverage under the Health Benefit Plan was established due to over-reported contributions;
  - Employer overpayments were made on behalf of a Non-Eligible Employee;
  - Employer overpayments were made on behalf of an employee not covered by the Employer's Collective Bargaining Agreement or Participation Agreement (other than a Non-eligible Employee);
  - Employer overpayments were made on behalf of non-employees;
  - One or more of the Plans incurred investment losses during the period an Employer overpayment was held by the Plans.
- Additional comments if necessary.

Section 3: Report on Prior Trustee Action. This Section will provide a status report on Trustee actions taken at prior meetings.

#### **STEP 6: COUNSEL’S REPORT ON ERRONEOUS CONTRIBUTIONS**

Prior to each Trustees meeting, Fund Counsel will prepare a report that includes a recommendation regarding each Employer request for refund, credit or offset of erroneous contributions. The report will also review follow up issues identified in Section 3 of the Benefits Office Report on Erroneous Contributions (See above).

Prior to each Trustees meeting, Fund Counsel will conference with Benefits Office personnel to review all Employers identified in the Benefits Office Report and review other issues relating to Employer overpayments. In addition, Fund Counsel will confer with the Auditor to discuss proposed recommendations and seek input where appropriate.

All Fund Counsel recommendations will take into account the applicable factors set forth in STEP 7 of these Procedures (see below).

Recommendations will not necessarily be limited to whether or not overpayments should be returned, credited or offset. For example, Fund Counsel will provide recommendations on the issue of whether pursuing benefit overpayments resulting from employer over-reporting is appropriate and, if so, the manner in which benefit overpayments should be pursued. Fund Counsel will advise whether other Trustee action is required in accordance with ERISA or the Internal Revenue Code.

#### **STEP 7: TRUSTEE REVIEW<sup>2</sup> OF REQUESTS FOR REFUND/CREDIT/OFFSET OF OVER-REPORTED CONTRIBUTIONS**

The Benefits Office Report on Erroneous Contributions and Counsel’s Report on Erroneous Contributions will be included with the Meeting Materials at all regular Trustees meetings and will be presented with Fund Counsel’s review of Employer Audit Appeals.

##### **Limitations placed on refunds, credits and offsets of Employer overpayments.**

While there are a number of factors the Trustees may take into account when considering whether an Employer may receive a refund, credit or offset of an overpayment, and while the Trustees have sole discretion to determine whether overpayments may be returned to Employers; that discretion is limited to the extent permitted by ERISA, the Internal Revenue Code and each Plan’s governing Plan documents. The following guidelines set forth the limits on Trustee discretion regarding the refund, credit and offset of Employer overpayments:

##### **Rule 1: Compliance with “One Year Rule” and “Payroll Audit Period Rule”**

A Refund, credit or offset of Employer overpayments is only available in cases where: (1) the Trustees receive a written request for refund, credit or offset within one year of payment of the contribution; or (2) the Employer overpayment was made during an

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<sup>2</sup> If, in accordance with STEP 4 of these Procedures, the Benefits Office is responsible for considering an Employer’s request for refund, credit or offset of erroneous contributions under the “One Year Rule” (*i.e.*, if the Benefits Office verifies that the Employer’s overpayment of contributions is solely the result of an arithmetical or clerical error), the Benefits Office shall comply with the policies and rules set forth in this STEP 7.

Employer's Payroll Audit period and the overpayment was first identified during the Payroll Audit.

**Rule 2: Overpayment must be the result of Employer's mistake of law or fact**

A Refund, credit or offset of Employer overpayments is only available if the Employer overpayment was made as the result of a mistake of law or fact. As a general rule, an Employer's effort to his However, This determination will be made on a case-by-case basis. But as a general rule, recordkeeping, accounting and clerical errors satisfy this requirement. Other situations may require Trustee judgment.

**Rule 3: Refund, credit and offset cannot include Plan Earnings/Refund, credit and offset must take into account Plan losses.**

Any refund, credit or offset of Employer overpayments cannot include earnings on such overpayments; moreover, any refund, credit or offset, must be reduced by any investment loss a Plan incurred while the Plan held the overpayment.

Where complexities relating to this rule arise, the Trustees should "err on the side of caution."

**Rule 4: Benefit payments related to overpayment/over-reported hours must offset the amount of refund, credit, or offset**

Any uncollected benefits paid in reliance on the overpayment (or over-reporting of hours in the case of the Pension Plan) must reduce the amount of any refund, credit or offset.

Due to administrative costs associated with recovering benefits from participants and beneficiaries and the uncertainty of full recovery, unless special circumstances exist, Counsel will recommend against refunds, credits or offsets of overpayments where a participant or beneficiary has already received a benefit that was the result of an erroneous overpayment.

**Rule 5: Overpayments on behalf of "Non-Eligible Employees"**

No refund, credit or offset of an Employer overpayment is permitted if it was made on behalf of a Non-Eligible Employee (See Article VI of the Employer Guidelines, which implements the arbitration award of Arbitrator Scheinman dated February 26, 2009) if the Non-eligible Employee's participation in the Plans was determined as a result of a Payroll Audit, such amounts must be forfeited.

**Rule 6: Offsetting the cost of the Payroll Audit**

In the event erroneous contributions were first identified during a payroll audit, any refund, offset or credit of erroneous contributions must be reduced by the cost of the Payroll Audit if the Employer was found to have had underreported contributions during the Payroll Audit period and the amount of underreported contributions, *without regard to the Employer's erroneous overpayments*, exceeded 5 percent of the contributions made by the Employer during the audit period

**Rule 7: Factoring in administrative costs and burdens**

Except in extraordinary circumstances, it is appropriate reduce the amount of any refund, credit and offset of Employer overpayments by the Plans' administrative costs related to the overpayment. Accordingly:

- If as a result of an Employer overpayment, an Employee maintained or established eligibility (as an Active Member or retiree) under the Health Benefit Plan, and regardless of whether claims were paid on the Employee’s behalf, or whether claims paid were less than overpayments the Health Benefit Plan received, it is unlikely a refund of any overpayment to the Health Benefit Plan on behalf of the Employee should be refunded, credited or offset.
- Where an Employer has made overpayments to the Annuity 401(k) Plan and the Payroll Audit Report also shows underpayments, the administrative burden of reconciling overpayments and underpayments may be considerable, and this burden should be taken into account when determining the amount of any refund, credit or offset of overpayments to the Annuity 401(k) Plan.
- If a refund, credit or offset of an Employer overpayment would necessitate an action by a Plan that constitutes an “adverse benefit determination” (as defined in DOL’s claims and appeals procedures) against a participant or beneficiary, the participant or beneficiary must be given appeal rights, and no refund, credit or offset of overpayments should be made until the participant’s or beneficiary’s deadline for filing an appeal with the Trustees has expired.
- If a refund, credit or offset of an Employer overpayment would necessitate an action by a Plan to pursue benefit overpayments, the Trustees may take into account in determining the amount of any refund, credit or offset, the administrative costs associated with pursuing benefit overpayments.

**Consideration of other factors.**

There are a number of other factors the Trustees may take into account that may limit the amount of any refund, credit or offset of overpayments. These include:

- Whether the Employer is currently delinquent or has a history of delinquencies. Generally, if an Employer is currently delinquent and: (1) the Employer’s delinquency has been referred to counsel, (2) the Trustees have filed suit against the Employer to collect delinquent contributions, or (3) the Employer has entered into a settlement agreement with the Trustees to resolve the delinquency, Counsel will recommend that the Trustees not grant the request for refund, credit or offset, and advise the Employer that the matter has been referred to Fund Collection Counsel.
- Whether in the past the Plans have had to sue the Employer to either collect delinquent contributions or compel an audit.
- How cooperative the Employer was during the audit process.

**Adopted on behalf of the Board of Trustees of the National Elevator Industry Pension Fund:**

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Signature

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Signature

Name: E. James Walker, Jr.  
Title: Chairman

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Date

Name: Larry J. McCann  
Title: Co-Chairman

\_\_\_\_\_  
Date

**Adopted on behalf of the Board of Trustees of the National Elevator Industry Health Benefit Plan:**

\_\_\_\_\_  
Signature

Name: E. James Walker, Jr.  
Title: Chairman

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature

Name: Larry J. McCann  
Title: Co-Chairman

\_\_\_\_\_  
Date

**Adopted on behalf of the Board of Trustees of the Elevator Constructors Annuity and 401(k) Retirement Plan:**

\_\_\_\_\_  
Signature

Name: Elizabeth Ceriello  
Title: Chairperson

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature

Name: Larry J. McCann  
Title: Co-Chairman

\_\_\_\_\_  
Date