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November 10, 2009

Elena Kagan, Esq.
Solicitor General of the United States
Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530-0001

Re: No. 08-1515, *Golden Gate Restaurant Ass'n v. San Francisco*
Response to Call for Views of the Solicitor General on Petition

Dear Solicitor General Kagan:

I am writing on behalf of The ERISA Industry Committee and the National Business Group on Health with regard to the Supreme Court's request for your views on the petition for writ of certiorari in the above-referenced case. Both of these associations ("the Employer Associations") represent the views of large employers on employee benefits issues and have appeared in this case as amici curiae in support of the Petitioner.

The Employer Associations urge the Solicitor General to ask the Supreme Court to grant the petition in order to address the vital question of ERISA preemption raised by the decision of the Ninth Circuit in the *Golden Gate* case. A copy of the amici brief of the Employer Associations, setting forth their perspectives on the case, is enclosed.[1]

We also request an opportunity to meet with you (or appropriate colleagues in your office) to discuss reasons why the federal government should continue to support the Petitioners in this case, including the following.

The Ninth Circuit analysis would allow employee benefits regulation to become balkanized. As the Supreme Court has recognized, "[t]he purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans."[2] By establishing a regime in which substantive requirements and regulatory oversight and enforcement would be governed exclusively by federal law, ERISA allows employers to provide uniform benefits and uniform plan administration for workforces in the many state and

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[1] We also enclose a copy of The ERISA Industry Committee's letter to the Hon. Nancy-Ann DeParle, which also addresses the vital importance of the ERISA preemption issue presented by this case.

[2] *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004); *accord Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990).

local jurisdictions in which they do business. Congress expressly sought to prevent a "patchwork scheme of regulation" that is inherently inefficient, more costly than a uniform national system, and a disincentive for employers to provide health care coverage and other benefits.[3]

As Congress appreciated when enacting ERISA, a patchwork quilt of local regulation affecting employee benefit plans is contrary to the interests of both employers and employees, especially—but not exclusively—to employees of large, multi-jurisdiction enterprises, which sponsor a disproportionate amount of the employee benefits such as health care coverage provided in the United States. When ERISA preemption is given its appropriate effect, employers may design uniform employee benefit plans for multi-jurisdiction workforces and administer those plans on a uniform basis nationwide, without incurring the burden of identifying and conforming to local regulation that may affect those activities. Employees of multi-jurisdiction enterprises benefit as well, both because preemption avoids burdens on plans that might otherwise translate into reduced (or eliminated) benefits and because employees can be offered nationally uniform benefit packages that will not be disrupted if they transfer to a worksite in another jurisdiction.

Contrary to these express congressional goals, the Ninth Circuit decision would allow a balkanized legal environment in which employers and plan administrators would be compelled to monitor and conform their plan design and plan administration decisions to numerous local laws and ordinances. As the amicus briefs submitted by the Secretary of Labor to the Ninth Circuit at the panel and rehearing stages recognized, the sheer number of city, county, and municipal regulatory authorities in the United States makes the potential for conflicting and inconsistent laws obvious:

> "... [P]ermitting the City to enforce San Francisco's health care spending requirements creates an obvious potential for conflict with pay-or-play laws that other jurisdictions have enacted or have considered, and imposes an impermissible burden on plan sponsors and administrators to monitor, coordinate, and comply with such differing obligations. ... Even if the administrative burden imposed by a single law may be tolerable, the cumulative burden could be staggering and runs directly counter to ERISA's goal of encouraging employers, who may operate nationally, voluntarily to provide uniform employee benefits under the legal

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[3] *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987); *accord FMC Corp. v. Holliday*, 498 U.S. 52, 60 (1990).

framework provided by a federal scheme with intentionally broad preemptive force."[4]

The Ninth Circuit introduces substantial confusion into ERISA jurisprudence. The fact that eight Article III judges—i.e., the dissenters from the denial of rehearing en banc—have concluded that the Ninth Circuit decision cannot be reconciled with the Fourth Circuit's decision in the *Fielder* case potently signals that regulators, employers, advisors, litigants, and judges in other circuits face two clearly divergent lines of analysis in determining the reach of ERISA preemption. Given the vital importance of this question, the nation would be ill-served by any proposal that the confusion introduced by the Ninth Circuit's analysis be allowed to "percolate" through further litigation that such confusion may engender.

The federal government has already supported preemption in this case. As noted above, and consistent with longstanding Department of Labor support for ERISA preemption, the then-Secretary of Labor twice appeared as an amicus before the Ninth Circuit to maintain that the San Francisco ordinance is preempted. The amicus briefs aptly pointed out that the interference that the ordinance would impose upon employee benefit plans could become manifold if other jurisdictions adopted their own spending and recordkeeping regimes.

Moreover, the analysis presented by the federal government in the Ninth Circuit correctly recognized that the alternatives required by the ordinance—including the City payment option as well as other spending options—mandate employee benefit structures and their administration. Thus, the ordinance interferes with nationally uniform plan administration, in violation of longstanding principles of ERISA preemption.

The Office of the Solicitor General has been a strong proponent of ERISA preemption. Since the enactment of ERISA in 1974, the Office of the Solicitor General (OSG) has a long and substantial record of actively supporting Congress's intention that the statute be given broad preemptive effect.

For example, in 1990, the United States appeared as amicus in the *Ingersoll-Rand* case to argue that a state law claim alleging wrongful discharge intended to prevent attainment of employee benefits was preempted by ERISA.[5] The OSG advocated this view even though the substantive goal of such a rule of state law claim would be harmonious with the goal protected by ERISA Section 510. During the same term, the United States also appeared as amicus in the *FMC* case, arguing in favor of the view that

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[4] Brief for the Secretary of Labor as Amicus Curiae Supporting Petition for Rehearing, 9th Cir. Nos. 07-1730, 07-17372, *Golden Gate Restaurant Ass'n v. City & County of San Francisco* (Oct. 2008) (reproduced in Appendix to the Petition at 62a, 79a).

[5] Brief for the United States as Amicus Curiae Supporting Petitioner in No. 89-1298, *Ingersoll-Rand Co. v. McClendon* (June 1990).

the "deemer clause" of ERISA Section 514 should not be construed in a manner that would have narrowed ERISA preemption.[6] During the next presidential administration, the OSG urged reversal in the *Boggs* case on the basis that ERISA preempted the state community property law on which the lower courts had relied.[7] In 2000, arguing in favor of the preemption of a state law in the *Egelhoff* case, the OSG noted that "Section 514(a), while not without limits, is clearly expansive in its preemptive sweep."[8] Similarly, in arguing that the doctrine of complete preemption (apart from Section 514) applied to certain state law claims in the *Davila* case in 2003, the OSG emphasized that preemption ensures that ERISA standards, including federal common law, will govern the operation of employee benefit plans.[9] Even in cases, such as *Kentucky Association of Health Plans*, in which the United States argued that state law was not preempted because it regulated insurance and was permitted by Section 514's savings clause, the OSG typically has acknowledged the expansive preemptive reach of ERISA that otherwise would have encompassed the state law.[10]

The Employer Associations urge the Solicitor General to adhere to this longstanding view of congressional intent and statutory interpretation by joining them in asking the Supreme Court to grant the petition for writ of certiorari and to reverse the Ninth Circuit's flawed preemption decision. Moreover, we would welcome the opportunity to meet with you or your staff to elaborate on the foregoing points and answer any questions that may help your office to appreciate all the relevant issues.

Sincerely yours,

John M. Vine

counsel for The ERISA Industry Committee and the National Business Group on Health

Enclosures (Brief of Amici Curiae and letter to Ms. DeParle)

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[6] Brief for the United States as Amicus Curiae Supporting Petitioner in No. 89-1048, *FMC Corporation v. Holliday* (April 1990).

[7] *Boggs v. Boggs*, 520 U.S. 833, 835 (1997) (noting position taken by the United States as amicus); *id.* at 863 (Breyer, J., dissenting) (referring to arguments made by the Solicitor General in favor of preemption).

[8] Brief for the United States as Amicus Curiae Supporting Petitioner in No. 99-1529, *Egelhoff v. Egelhoff* (August 2000) (internal quotation marks omitted).

[9] Brief for the United States as Amicus Curiae Supporting Petitioners in Nos. 02-1845 and 03-83, *Aetna Health Inc. v. Davila* (Dec. 2003).

[10] *See, e.g.*, Brief for the United States as Amicus Curiae in No. 00-1471, *Kentucky Ass'n of Health Plans, Inc. v. Miller* (Nov. 2001).

cc: Hon. Kathleen Sebelius (Secretary of HHS)
Hon. Nancy-Ann DeParle (White House)
Hon. Hilda Solis (Secretary of Labor)
Hon. Phyllis Borzi (Ass't Secretary of Labor)
Hon. Deborah Greenfield (Acting Dep. Solicitor, DOL)
Hon. Timothy Hauser (Assoc. Solicitor, DOL)