The ERISA Industry Committee

April 29, 2010

Hon. Peter Orszag, Director
Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Kevin F. Neyland, Deputy Administrator
Office of Management and Budget
Office of Information and Regulatory Affairs

Brenda Aguilar, Policy Analyst
Office of Management and Budget
Office of Information and Regulatory Affairs

Dear Director Orszag, Deputy Administrator Neyland, and Policy Analyst Aguilar:

Thank you for the opportunity afforded us and other representatives of the National Coalition on Benefits on April 6 to meet with Office of Management and Budget and other Administration representatives to discuss the draft proposed U. S. Department of Labor ("DoL") regulation that would define "welfare benefit plan" under ERISA to exempt from ERISA preemption State and local government health plans that include non-governmental employees.

Having presented a portion of our argument, I want to take this opportunity to reiterate our concerns regarding the draft regulation. Although we have not seen the text of the draft, we have met with DoL officials and we believe we understand the approach taken by the draft and its intent. Based on that understanding, we believe that the draft proposed regulation -

- Is superseded by PPACA and is therefore unnecessary;
- Would not resolve the ERISA preemption issues that State and local health care laws raise; and
- Would interfere with successful implementation of PPACA.

The ERISA Industry Committee

The ERISA Industry Committee ("ERIC") is a nonprofit association committed since 1976 to advancing the employee retirement, health, incentive, and welfare benefit plans of America's largest employers. ERIC's members provide comprehensive health care coverage, retirement, incentive, and other economic security benefits directly to tens of millions of active and retired workers and their families. ERIC has a strong interest in proposals that affect the ability of major employers to deliver high-quality benefits cost-effectively.

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BACKGROUND

ERISA regulates employee benefit plans, including health care plans, established or maintained by an employer and, with limited exceptions, preempts State laws relating to such plans. Although ERISA does not apply to a plan maintained by a State or local government for its own employees, the DoL has recognized that if a governmental plan that covers more than a de minimis number of private-sector employees, the exclusion for governmental plans does not apply. As a result, if a State or local government plan covers more than a de minimis number of private-sector employees in a health plan maintained by the State or local government, the plan will be subject to ERISA, and the State or local law will be preempted.

We understand that the proposed regulation would effectively create a "safe harbor" that 50 States or thousands of local governments could follow in enacting their own health care legislation. The purpose of the "safe harbor" is to facilitate State and local governments adoption of their own health care plans without establishing ERISA-governed plans and having those plans preempted by ERISA.

The Proposed Regulation is Superseded by PPACA and Is Therefore Unnecessary.

The proposed regulation was drafted before the *Patient Protection and Affordable Care Act* ("PPACA") was enacted and needs to be reconsidered in light of PPACA. To do otherwise, would, as described in comments at the April 6th meeting, lead to a confused and incoherent national health policy. PPACA eliminates the need for the State and local health care reform efforts contemplated by the regulation. Moreover, PPACA provides the States with an important role in implementing health care reform on a nationwide basis.

If the States exercise their roles under PPACA, neither the States nor local governments will need to adopt legislation that raises ERISA preemption issues. ERISA does not preempt other *federal* laws, including PPACA. As long as the States enact only legislation that does what Congress specifically provided under PPACA (and no more), it is not clear, at the present time, that the States would run into preemption issues.

The Proposed Regulation Would Not Resolve the ERISA Preemption Issues.

The proposed regulation would not resolve the ERISA preemption issues raised by State and local laws in any event. This is so because a State or local law can be preempted even if the law does not establish an ERISA-governed plan. For example, if a State or local law interferes with the uniform nationwide administration of an ERISA-governed plan, the courts have ruled that the State or local law is inconsistent with the explicit intention of ERISA that, to ensure the continued sponsorship of employer plans, those plans be protected against a patchwork of laws, regulations, and administrative requirements.

To illustrate, in the *Golden Gate Restaurant Association* case, the district court ruled that ERISA preempted the San Francisco Ordinance even though the court did not find that an employer's payments to the City of San Francisco created an ERISA-governed plan. The Department of Labor's amicus brief to the Ninth Circuit Court of Appeals likewise recognized that ERISA preempts a State or local law that would subject ERISA-governed plans to administrative requirements even if the law does not establish an ERISA-governed plan.

The Proposed Regulation Would Interfere with Implementation of PPACA.

The proposed regulation would also create major confusion among State officials, employers, insurers, and participants because the proposed regulation does not appear to be linked to the regimen required for the exchanges or the risk pools authorized under PPACA. Indeed, the draft regulation appears to establish an entirely new regimen that was not approved by Congress.

Employers may not distinguish the PPACA exchanges from the plans contemplated by the regulation and may view both as threatening the efficient administration of employer-sponsored group health plans. While States may adopt exchanges under PPACA, local governments may establish their own plans, thus balkanizing the regulation of health care coverage, recreating the pre-1974 chaos that ERISA halted, and undermining employer plan sponsorship.

ERISA's preemption provision has been the source of many highly contentious disputes. In most cases, the courts have upheld the broad protections and policy provided by ERISA preemption. If the draft regulation is adopted as a final regulation, the regulation will undoubtedly be challenged in the courts. As a result, the proposed regulation will needlessly divert the attention of the Administration, State and local governments, the nation's largest employers, and the courts from the numerous challenges and opportunities presented by the implementation of PPACA.

The Department of Labor's position in its amicus brief in the Court of Appeals in *Golden Gate* is correct and reflects the intent of ERISA's framers and over three decades of consistent policy: that employer-sponsored plans are best encouraged by a uniform nationwide regulatory regime and that ERISA preempts potentially conflicting State and local rules. In addition, conflicts between the States and the Federal government, as well as with substantive law, should be avoided.

Accordingly, we strongly urge that the draft proposed regulation be withdrawn and reevaluated in light of the concerns outlined in this letter. We realize this is a difficult and complex issue and thus appreciate all the more your careful consideration.

Very truly yours,

Mark J. Ugoretz
President & CEO