The ERISA Industry Committee

June 4, 2010

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Centers for Medicare & Medicaid Services
Department of Health and Human Services
P.O. Box 8014
Baltimore, MD 21244-8014

Attention: DHHS-9996-IFC

Ladies and Gentlemen:

The ERISA Industry Committee ("ERIC") is pleased to submit these comments on the interim final regulations implementing the Early Retiree Reinsurance Program ("ERRP"), as established by section 1102 of the Patient Protection and Affordable Care Act (PPACA). The interim final regulations were published by the Department of Health and Human Services in the *Federal Register* on May 4, 2010.

ERRP is a temporary program intended to reimburse employment-based plans for a portion of the cost of health benefits for pre-Medicare eligible retirees aged 55 to 64 and their dependents. The program, which Congress funded with $5 billion, will commence on June 21, 2010 and end no later than January 1, 2014. The stated purpose of the program is to "make health benefits more affordable for plan participants and sponsors so that health benefits are accessible to more Americans than they would otherwise be without this program."

ERIC members share these concerns over the affordability and accessibility of health benefits. As described in more detail below, ERIC's comments are primarily focused on making the ERRP application and reimbursement methodology more fair and even-handed and instilling more flexibility in the new regulatory maintenance of effort provision. We also recommend that administrative costs be eligible for ERRP reimbursement and that plan sponsors not be required to submit proof of a retiree's payment of his or her share of a medical claim.

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ERIC's Interest in the Interim Final Regulations

ERIC is a nonprofit association committed to the advancement of the employee retirement, health, incentive, and welfare benefit plans of America's largest employers. ERIC's members sponsor some of the largest private group health plans in the country, which provide comprehensive health benefits to tens of millions of workers and their families. Many of these plans also provide generous retiree health benefits.

ERIC's members are committed to, and known for, providing high-quality, affordable health care. They expend considerable resources to maintain plans of this caliber. High-quality, affordable health care has become an increasingly difficult standard for many companies, however, as medical costs continue to grow at unsustainable rates.

Although employers often absorb much of the burden of these higher costs, many are opting not to continue their retiree coverage; the downward trend in company-provided retiree health programs over the last few decades bears out the unfortunate consequences of these rising costs. As the White House Fact Sheet on ERRP points out, the percentage of large firms providing workers with retiree coverage dropped from 66% in 1988 to 31% in 2008.

The federal government has acknowledged the desirability of encouraging employers to continue to provide health coverage for their retirees. When a prescription drug program was created for Medicare beneficiaries in 2003 as part of the Medicare Prescription Drug Improvement and Modernization Act, a retiree drug subsidy ("RDS") to employers was included as part of the legislation to encourage them to continue to sponsor prescription drug coverage for their retirees.

RDS has been an enormous success; approximately 4,000 plan sponsors covering seven million retirees apply annually for the subsidy. (Regrettably, indirect changes to the subsidy in PPACA have diminished its value, which is likely to result in the cessation of retiree drug coverage by a substantial number of employers.)

PPACA created the ERRP program for the purpose of temporarily defraying health plan costs for both employers and pre-Medicare retirees. The $5 billion devoted to this program could result in a substantial cost savings benefiting both companies and individual retirees (and their families) in addition to encouraging employers to continue to provide affordable retiree health coverage.

Comments on the Regulation

1. The application process must be fair and even-handed.

The ERRP regulation indicates that "applications will be processed in the order in which they are received" and that HHS may stop accepting applications based on the availability of the $5 billion appropriated for the program. (Applications must include projections as to the amount of claims anticipated to be made by an applicant over the first two years of the program. Based on those projections, HHS may close the application process because of the projected exhaustion of funds.)

Unlike RDS, the reinsurance program has a fixed budget. Thus, the application and claims processes are extremely critical to the fair and equitable operation of the program and the satisfaction of its intended objectives.

Our understanding of the process, which has not yet been formalized, is that applications will be date and time-stamped. Apparently the initial application procedure will be paper-based; ultimately the process will be electronic. Reimbursements will be paid only to those plan sponsors whose applications have been approved by the Secretary and will be paid only until program funds have been exhausted.

Our concern with this approach to reimbursement is that such a method could easily result in much, or even the entirety, of the $5 billion available for the program being allocated to only a few large funds. Under this scenario, only those funds and their plan participants that are fortunate enough to be at the very front of the application queue would benefit in the ERRP largesse; this would leave other retiree plans to struggle alone to meet the rising costs of health care, unaided by the federal funds which had been appropriated for this purpose.

Moreover, the process for determining who will ultimately be allowed to receive ERRP funds is not clear. The principle of "first-come, first served" places a premium on being "first in line" to file an application, yet the process for determining the "first in line" does not seem to be objectively measurable or transparent. For instance, for electronic submissions, the "first in line" appellation might well be due to nothing more than how the receiving government computer sorts through a large stack of electronically delivered applications - all of which were *sent* at almost precisely the same moment. Similar problems arise if applications are to be delivered as a paper submission and judged by a postmark or fax stamp or – if delivered in person – by one's position in line at HHS on the day that applications first may be submitted.

Concerns about the validity of the placement of a company's application in the reimbursement queue, coupled with a potential lack of transparency, could cause many to question the fairness of the process.

ERIC members have also raised concerns that an electronic submission system, once instituted, may not be fully reliable for some period of time. Apparently this was an issue during the early stages of the RDS process. ERIC members are concerned that the problems that plagued the RDS process, such as computer malfunctions that delayed applications for several months, could be especially troublesome, particularly considering the volume of ERRP applications that potentially could be transmitted at the same time.

Many companies are now wrestling with the decision of whether to even apply for ERRP funds. Some have already decided not to pursue reimbursement. Many have been dissuaded by the cost of the application and claims process, which for large companies could amount to $250,000 or more. If the chance of receiving funds from ERRP appears to be severely limited, as many currently believe, then the high cost of applying will deter many who otherwise would participate. Retirees in these companies thus will receive no help with the rising costs of their health care.

ERIC urges an approach whereby all companies that file a complete application within a certain period of time – e.g., two days, two weeks, or even two months – be permitted to participate in the program and ultimately to be capable of being reimbursed for claims. Within this pool of applicants, reimbursements could be apportioned on a pro rata basis, perhaps one where all retiree claims filed in each claims reimbursement period were comparably reimbursed until the $5 billion in funding were exhausted.

We would be happy to work with you to develop a more fair procedure, one where all companies were capable of applying for the program - and filing for reimbursement - from a level playing field. We would also ask that, whatever procedures are ultimately followed with respect to the disbursement of ERRP funds, that the process be open and transparent, and that the results of the "first come, first served" categorization be published.

2. Receipt of ERRP claims reimbursements should not impose an unreasonable "maintenance of effort" requirement on employers.

Under section 149.40 of the regulation, an applicant must submit an application for each plan for which it is seeking reimbursement. In connection with this application, the applicant must submit a number of items, including a summary indicating how the applicant will use any reimbursement received under the program to meet the requirements of the program. This summary will include how the reimbursement will be used to

reduce costs for plan participants and/or health benefit or premium costs for the sponsor. The summary will also include how the sponsor will use the reimbursement to "maintain its level of contribution to the applicable plan."

Section 149.200 of the regulation reiterates that a plan sponsor may use the ERRP proceeds to reduce costs for plan participants and/or the plan sponsor. This section stipulates, however, that the proceeds must not be used as general revenue for the sponsor.

In expanding upon these requirements, the preamble to the regulation states that because "the statute requires that funds dispersed under this program not be used as general revenue, we are requiring sponsors to maintain the level of effort in contributing to support their applicable plan or plans. Otherwise, sponsors might circumvent the prohibition on using the program funds as general revenue by using, dollar for dollar, sponsors' funds not otherwise used for health benefits due to the program reimbursement, as general revenue."

The preamble goes on to say that it is expected that sponsors will use the reimbursed funds to pay for increases in sponsor-paid premiums or other health benefit costs and/or to reduce costs to participants. Later the preamble states that they expect that sponsors "will continue to provide at least the same level of contribution to support the applicable plan, as it did before this program." The preamble then provides an example of a sponsor being permitted to use the ERRP reimbursements to pay the sponsor's share of a premium increase from one year to the next, thus reducing sponsor plan costs.

ERIC members have expressed significant concerns both with respect to how the ERRP maintenance of effort provision will be applied as well as the period of time that employers could be subject to the requirement.

<u>Application of the maintenance of effort provision</u>

a. Any maintenance of effort provision should be linked solely to the receipt of ERRP funds. Merely submitting an application and agreeing to the terms and conditions of the ERRP program should not force an employer to comply with the maintenance of effort provision, regardless of whether or not the employer ever were to receive ERRP funds.

Such a requirement would be inappropriate. Companies who have no guarantee of ever receiving ERRP funds will be extremely reluctant to submit an application to the program because to do so might tie them to a maintenance of effort requirement for an untold number of years.

b. Any maintenance of effort provision adopted in compliance with this regulation should have a finite ending date. Currently the regulation does not provide guidance as to how long employers must continue their maintenance of effort, nor does the regulation specify the length of the period during which employers may use ERRP funds.

We believe that any maintenance of effort provision should extend no longer than employers have unused ERRP funds. Thus, if an employer received funds in Year One that were not fully expended until Year Three, the maintenance of effort should extend no longer than to Year Three. We also believe that employers should have at least two full years (after the year of receipt) in which to use ERRP funds.

c. PPACA requires that ERRP funds not be used as general revenue to the plan sponsor. This statutory requirement should not be narrowly interpreted to require a maintenance of effort requirement based on a zero reduction in the actual dollar amount of employer health care spending from one year to the next. A maintenance of effort rule, and particularly one evaluated only in straight dollar terms, is needlessly restrictive.

For instance, some ERIC members allocate health care costs between the company contribution and the participant contribution based on a pre-determined formula. Each contributes a fixed percentage of health care costs from one year to the next. We believe that maintaining this same ratio of shared costs from one year to the next is consistent with a maintenance of effort rule.

Other members may wish to change plan design provisions or retiree contributions to satisfy the maintenance of effort provision. This flexibility should be maintained so long as the sponsor does not use the funds as a source of general revenue.

Similarly, the maintenance of effort requirement could be based on a per capita amount rather than an aggregate cost. Thus, employers who were forced to reduce their workforce but still contributed the same amount per participant from one year to the next should be considered to have satisfied the maintenance of effort rule. Further, in situations where participants do not contribute to the cost of their health care, it would be unfair not to permit employers to receive ERRP funds even if the increase in projected plan costs for the subsequent year were less than the amount of ERRP funds received for the current year.

3. Administrative costs should be eligible for reimbursement.

Both the administrative costs of running the employer's health plan and the expenses of applying for ERRP funds should be considered "other health benefit costs" for which employers may legitimately be reimbursed under ERRP.

These administrative expenses are as integral to defining the overall cost of the employer's plan as are payments to providers for medical care. If employers must spend money to administer their health plans or apply for ERRP funds, then the resources available to pay medical claims are correspondingly reduced. Employers simply do not have an infinite pot of money from which to draw for health care. A reimbursement methodology that does not acknowledge this reality could serve as a disincentive to those who would otherwise choose to participate in the ERRP on behalf of both the company and its retirees.

4. The requirement that a plan sponsor produce proof that a retiree has paid his or her portion of a claim should be dropped.

Sec. 149.335(b) of the regulation states that in order for a sponsor to receive reimbursement for the portion of a claim that an early retiree paid, the sponsor must submit "prima facie" evidence that the early retiree paid his or her portion of the claim. In most cases, this "evidence" is not available, nor is it easily procured. We recommend either that this rule be dropped and that ERRP funds be used to reimburse only the plan sponsor's portion of the claim or (in accordance with the methodology used by the RDS program) that the ERRP reimbursement be based only on claims paid.

ERIC appreciates the opportunity to provide comments on the interim final regulations. If you have any questions concerning our comments, or if we can be of further assistance, please let us know.

Sincerely,

Mark J. Ugoretz
President & CEO