The ERISA Industry Committee

January 18, 2010

President Barack Obama
The White House
1600 Pennsylvania Avenue N.W.
Washington, DC 20500

Dear Mr. President:

The ERISA Industry Committee (ERIC) applauds Congress' efforts to extend health insurance coverage to millions of Americans. This is a goal ERIC firmly supports and called for in our 2007 white paper.[1]

As advocate for America's largest employers, all of which provide comprehensive health care coverage, we also firmly support the continued success of the employer-based health care system. The plans provided by our members and other employers offer the most efficient, effective, and high quality health care to 170 million Americans. You have frequently promised that these Americans, particularly workers, will be able to keep the health care coverage they have if they so wish; our fear is that some provisions of the legislation currently being considered in Congress will deliver a devastating blow to employer-based plans that will effectively nullify this promise.

Core elements: The employer-based system in this country rests on core elements that would be jeopardized by some provisions in the health care legislation currently under debate. These elements are as follows.

> ***National Uniformity and Preemption***: The foundation of the employer-based system is the ability of employers to offer benefits under a set of uniform rules enforced by the preemption provisions of the Employee Retirement Income Security Act (ERISA), a fact clearly recognized by the framers of ERISA in 1974, ensuing legislative and regulatory decisions, and unswerving judicial decisions. Preemption allows large self-insured plans, which generally operate in multiple states, to avoid the patchwork quilt of potentially thousands of diverse rules of the states and municipalities.
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> Multi-state employers are able to offer benefits to their employees and their families efficiently and fairly and without the expensive and cumbersome necessity of complying with potentially thousands of municipal and state laws and regulations. Health care is not confined within state borders: it is provided in major medical markets that transcend state and local boundaries. The parties best able to determine how multi-state employers should provide benefits to their

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[1] *A New Platform for Life Security Benefits;* The ERISA Industry Committee; 2007; www.eric.org.

employees are the employers themselves, not state and municipal legislators. Employees in these plans are the major beneficiaries of national uniformity, benefiting from lower costs, fewer incoherent administrative burdens, and benefits that are not constrained by state or municipal boundaries and follow them when they transfer to a new location.

***Voluntary nature*:** A key element of the employer-based system is that it is voluntary, both with respect to the decision to offer benefits as well as in the determination of the structure of the benefits. Employers can determine whether it is cost-effective to offer benefits to their employees and can design a plan that best accommodates the needs of their particular workforces, which vary by industry, region, and size not only among companies but often within the same enterprise.

***Adverse selection*:** A principal feature of large employer plans is that risk is spread over large pools of employees. Thus, premiums do not skyrocket when workers get older or when employees become sick with a serious illness. Instead, these higher costs are averaged among all of the participants.

***Affordability*:** Affordability for both employers and employees is critical to the continuation of the employer-based system. The current federal tax structure, which provides favorable tax treatment to employer-provided plans, supports the continuation of a fair and affordable system by making it possible for employers to provide high quality coverage their workers can afford. Cost-shifting from Medicare is, however, a constant threat to this affordability and threatens to undermine the efficiency and innovation that are hallmarks of the employer-based system.

Legislative threats: Both the House and Senate health care reform bills contain provisions that would significantly destabilize the employer-based system and in all probability would lead to the demise of the system itself within a few years. The most significant of these provisions that would cause irreparable harm to the core elements listed above include the following:

Preemption: Nothing must be included in health care reform legislation that would cause a crack in the foundation of national uniformity and ERISA preemption. We are especially concerned by several provisions in the House and Senate bills such as, but not necessarily limited to, those addressing state waivers from certain provisions, internal and external appeal requirements, and the application of state remedy laws. Even though these provisions may not directly or immediately apply to self-insured plans, they may too easily be extended in the future to undermine these plans as well.

Thus, we are also concerned that the institution of state exchanges or a state controlled health care system, rather than the creation of a national exchange system with a uniform set of rules, also would make self-insured plans vulnerable to the myriad state regulations that the current ERISA framework so carefully avoids.[2]

[2] See for example The ERISA Industry Committee's *"A New Platform for Life Security Benefits,"* 2007; www.eric.org.

Voluntary nature: A pay-or-play mandate, such as that included in the House bill, would clearly limit an employer's ability to decide how to configure the firm's compensation and benefit structure as well as any decisions with respect to the level of benefits offered.

In addition, a provision such as the so-called "Tierney" provision, which would limit an employer's ability to determine the level of retiree health benefits offered by the firm, would also remove from the employer the ability to design compensation and benefits tailored to the needs of that workforce. Unless employers are able to align employee benefits and compensation with changing economic circumstances, no employer will commit to long-term obligations especially given Congressional reluctance to permit pre-funding of retiree health benefits. Moreover, employers that now provide any voluntary benefits will be deterred from offering them if voluntary can be redefined as mandatory at the stroke of a legislator's pen.

Adverse selection: A provision to allow certain employees to exit the employer's plan and buy with employer funds a cheaper plan from an exchange would encourage the exodus of the most favorable risks from the employer's plan, leaving behind the older and sicker—and therefore more expensive—fragment of the workforce. Eventually premiums would be driven to the point where the employer-based plan would be unaffordable to both employers and employees. The "voucher" provision in the Senate bill (the so-called "Wyden" provision) would in fact lead to fragmentation and adverse selection even though the provision appears to apply only to a circumscribed group of employees. We are very concerned that this provision (by an expansion of the group of affected employees) would significantly damage an employer's ability to spread risk over a large group of plan participants. Those who would suffer most would be the remaining workers.

Tax treatment: Fortunately, it does not appear that final healthcare reform legislation would end the overall favorable tax treatment of employer-provided health care. We remain concerned, however, that a future termination of the favorable tax treatment of the employer-based system, in addition to dramatically increasing the cost of insurance for employees, would also undermine an employer's risk pool. Loss of favorable tax treatment would be especially problematic if all employees were allowed to exit the employer's plan and buy cheaper insurance through an exchange (as in the voucher system described above). The loss of favorable tax treatment for employer plans, by itself and coupled with the voucher system, would lead to spiraling adverse selection that ultimately would force employers to retreat from offering coverage.

Affordability: We are gratified that a public plan option apparently will not be included in a final bill and, thus, employer plans will not be at risk from the cost-shifting that would inherently result from a public plan option.

Further, we believe that affordability would be enhanced by provisions in the current Senate bill that would permit employers to reward employees who participate in wellness and prevention programs. Although the basic reward ceiling would be raised from 20% to 30% of the cost of employee-only coverage, the bill would permit HHS, Labor, and Treasury to increase this amount to 50%. Provisions such as these are instrumental in encouraging employees to take more responsibility for and improve their health and, ultimately, should result in a healthier and more productive workforce and lower-cost health plans.

Tax on "high cost" plans: The new taxes in the legislation will either penalize employers that provide health benefits or increase the systematic cost of providing health benefits. In particular, inclusion of a 40% excise tax on what are mislabeled "high-cost" plans would jeopardize the continued viability of employer-based coverage. This tax is both inequitable and unfair as it imposes a tax on premium costs regardless of the relative value of the benefits. Thus, plans sharing an identical design and actuarial value would be subject to different levels of taxation because of their underlying demographics, claims history, and geographic region of operation, and not because of the inherent "richness" of their plan design. Moreover, an employer's first reaction to this type of tax would be to cut benefits from the plan in order to avoid taxation. As a result, employees and other plan participants will not be able to keep the plan coverage they had, regardless of your promise.

Not only do we strongly object to the excise tax in general, we also oppose the exemption of any group of employees (such as union members) from application of the excise tax provisions; such an exemption would be unfair to both employers and other workers, many of whom would bear the cost of disparate benefits. Employees working side-by-side earning similar wages would be subject to taxation based on their union or non-union status and not because of the cost of their health plan or its benefits. Moreover, other employees would bear a heavier burden of this tax in order to exempt union members from its application, building an inherent inequity into what is labeled as "reform."

***Medicare Part D*:** It appears likely that any new health legislation will eliminate the deduction of the subsidy amount for employers who maintain prescription drug plans for their Medicare Part D eligible retirees. This is a counter-productive proposal that will result in employers ending their retiree prescription drug plans, the cost of which will then be borne in large part by the federal government.

In conclusion: Reform of our health care system is of vital importance to our nation's citizens, and it is of vital importance to our nation's employers. It is imperative, however, that in transforming the framework of our current system we do not simultaneously demolish the employer-based plans that effectively and efficiently deliver health care to the millions of workers and their families who value - and wish to preserve - their current coverage. Moreover, reform must treat all stakeholders equitably, not favoring some over others.

Most important from the point of view of those who pay for health care, reform will be an empty promise unless costs are brought under control. Rising health care costs are on track to explode Medicare, and they jeopardize the fundamental ability of employers to provide workers with affordable, meaningful coverage. Our economy is imperiled by these costs, which are already cutting into savings for retirement, consumer spending, education, and housing, and are threatening our ability to compete globally as well.

While we recognize that the nation's payment and delivery system cannot be corrected overnight, we have in fact been working at reform too long for cost control not to be given serious attention in current and future legislation.

We would be pleased to discuss these issues with you or members of your staff. For more information, please contact me or Gretchen Young, Vice President, Health Policy, at (202) 789-1400.

Sincerely,

Mark J. Ugoretz
President

cc: Senator Harry Reid (D-NV)
Senator Mitch McConnell (R-KY)
Senator Max Baucus (D-MT)
Senator Michael Enzi (R-WY)
Senator Charles Grassley (R-IA)
Senator Tom Harkin (D-IA)
Senator Richard Durbin (D-IL)
Senator Mitch McConnell (R-KY)
Senator Jon Kyl (R-AZ)
Representative Nancy Pelosi (D-CA)
Representative John Boehner (R-OH)
Representative Charles B. Rangel (D-NY)
Representative Henry Waxman (D-CA)
Representative George Miller (D-CA)
Representative John Kline (R-MN)
Representative Dave Camp (R-MI)
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Hon. Nancy-Ann DeParle (The White House)