April 6, 2020

The Honorable Eugene Scalia
Secretary
U.S. Department of Labor
200 Constitution Ave, NW
Washington, DC 20210

The Honorable Alex Azar
Secretary
U.S. Department of Health and
Human Services
200 Independence Avenue, SW
Washington DC, 20210

The Honorable Steven Mnuchin
Secretary
U.S. Department of Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

RE: COVID-19 Requested Guidance for Plan Sponsors to Support Their Employees and Families

Dear Secretaries Scalia, Azar, and Mnuchin:

The ERISA Industry Committee (ERIC) writes to request guidance critical to plan sponsors on COVID-19 employee benefits issues that are under the jurisdiction of the United States Department of Labor (Labor), the Internal Revenue Service (IRS) and Treasury Department (Treasury) (together, the "Agencies"), and the Department of Health & Human Services ("HHS") (all three together, the "Tri-Agencies"). Given the overlap among the Tri-Agencies on many of these issues, we thought it most efficient for each Department to receive the entire request at the same time.

ERIC requests additional COVID-19 guidance as an important step towards expanding and clarifying the immediate March 2020 guidance and legislation associated with COVID-19, including the Families First Coronavirus Response Act (H.R. 6201), the Coronavirus Aid, Relief, and Economic Security (CARES) Act (H.R. 748), IRS Notice 2020-15, and other actions. ERIC member companies strongly support the core of the March 2020 guidance and legislation, and appreciate the Congressional and Administration efforts to help plan sponsors and company employees, but believe that quick, succinct, and expansive administrative guidance is necessary to help employers wage their own war against COVID-19 for the benefit of their employees, customers, and stakeholders. We ask that this guidance be provided as soon as possible to avoid employers unnecessarily devoting resources to these compliance matters.

ERIC is a national advocacy organization that exclusively represents large employers that provide health, retirement, paid leave, and other benefits to their nationwide workforces. With member companies that are leaders in every sector of the economy, ERIC advocates on the federal, state, and local levels for policies that promote flexibility and uniformity in the administration of their employee benefit plans. ERIC supports the ability of its large employer member companies to tailor retirement, health, and compensation benefits to meet the unique needs of their workforces and has a strong interest in policies that impact the ability of employers to provide effective and cost-efficient retirement and health care programs to millions of workers, retirees, and their families. As such, ERIC has a vested interest in legislation addressing COVID-19 and in necessary additional guidance that will expand and clarify the March 2020 guidance and legislation.

I. Requests to Tri-Agencies with Regard to the March 2020 COVID-19 Legislation and Guidance

ERIC supports the March 2020 COVID-19 legislation and guidance as important first steps in addressing retirement and health issues for employers and their employees. However, the March 2020 COVID-19 legislation and guidance is only a beginning: it requires clarification and expansion to help employers and their employees.

With regard to the March 2020 COVID-19 legislation and guidance, we request that the Tri-Agencies (where appropriate, separately, or jointly):

- Allow more liberal suspension of 401(k) safe harbor distributions
- Define affected participants for partial plan terminations to exclude from accelerated vesting employees who terminate employment voluntarily
- Provide additional guidance related to the participant loan provisions of the CARES Act
- Provide additional guidance related to the suspension of required minimum distributions in 2020
- Clarify the definition of participants affected by COVID-19 for purposes of the applicable CARES Act provisions
- Expand the definition of "Infectious Diseases" in IRS Notice 2004-23 to all infectious diseases, pandemics, and public health emergencies
- Except telemedicine from ACA and ERISA requirements
- Relax telemedicine state licensing requirements
- Clarify the effective date of the CARES Act telemedicine provisions
- Adopt a safe harbor for determining full time employees under the CARES Act employee retention credit
- Extend due dates and deadlines for annual funding notices, determination letters, summary material modifications, and for filing Forms 10, 4010, 4063, and 5500.

Each request with regard to the March 2020 COVID-19 legislation and guidance is further explained below. These requests are identified either as a retirement plan issue or a health and welfare issue.

A. COVID-19 Related Retirement Plan Issues.

1. <u>Allow More Liberal Suspension of 401(k) Safe Harbor Contributions</u>. Existing guidance permits mid-year suspension of 401(k) safe harbor matching contributions only if (i) the plan sponsor is operating at an economic loss, or (ii) the right to suspend safe harbor matching contributions mid-year was reserved in the prior year's safe harbor notice to participants. Many plan sponsors did not anticipate the current pandemic and, accordingly, foresaw no need to reserve a right in last year's safe harbor notice to suspend safe harbor matching contributions during 2020. Those plan sponsors may not be operating at an economic loss, but are nevertheless experiencing severe financial hardship and seek relief by eliminating safe harbor matching contributions for the remainder of the year. The IRS has authority to grant such relief, and we strongly believe they should do so. In that event, plan sponsors that suspend matching contributions will be required to satisfy the actual deferral percentage (ADP) and actual contribution percentage (ACP) for the entire 2020 plan year. If such tests fail, corrective qualified non-elective contributions (QNECs) would be required during the 2021 plan year. That timing of corrective contributions would likely exacerbate

the plan sponsor's pandemic-related financial hardship or impede its recovery from that hardship. Again, the IRS has authority to extend the correction period and we urge them to do so by an additional two years.

2. Define Affected Participants for Partial Plan Terminations. Pandemic-related facility closings may reduce the number of active plan participants sufficiently to cause partial plan terminations, requiring full vesting of all affected participants. While participants who terminate employment voluntarily during the period in question are not taken into account in determining whether there has been a sufficient reduction in plan participation to cause a partial termination, they nevertheless benefit from full vesting under existing IRS guidance. The IRS has authority to grant relief from that requirement and we urge them to issue guidance providing that participants who terminate employment voluntarily during 2020 or 2021 will not be treated as affected participants in the event of a partial plan termination attributable to the pandemic.

3. Provide Additional Guidance related to the Participant Loan Provisions of the CARES Act. One of the CARES Act provisions requires the suspension of any loan repayment by participants affected by COVID-19, effective as of the Act's passage. Guidance should be issued making clear that suspension of loan repayments is not required until a participant provides the plan administrator or its delegate (e.g., the plan's recordkeeper) with a self-certification or other evidence that the participant qualifies for loan suspension. In addition, guidance is needed to harmonize the CARES Act changes with existing DOL guidance related to loans available for affected participants. ERISA section 408(b)(1) exempts plan loans to participants from ERISA prohibited transaction restrictions, so long as, among other things, the loans are adequately secured. DOL regulation 29 CFR section 2550.408b-1(f)(2) prohibits use of more than 50% of a participant's vested accrued benefit as security for all outstanding plan loans to that participant. In order to facilitate the increased new limits on plan loans, we urge the DOL to correspondingly revise its regulatory restriction on use of a participant's vested accrued benefit as security for plan loans to that participant. Furthermore, guidance should be issued confirming that the increase in distribution limits are optional on the part of the plan sponsor.

4. Provide Additional Guidance related to the Suspension of Required Minimum Distributions for 2020. The CARES Act suspended the requirement to issue required minimum distributions (RMD) for 2020. The CARES Act makes this suspension optional with the plan sponsor. However, if the plan has already issued what was believed to be an RMD for 2020, or the plan sponsor wishes to have the plan continue to issue planned distributions in 2020, there is a risk that such distributions may create a qualification issue, e.g., where the plan document allows participants over the required beginning date to defer distributions other than RMDs. A similar issue arose under the Worker, Retiree, and Employer Recovery Act of 2008 ("WRERA"), which suspended required minimum distributions in 2009 on substantially the same terms as the CARES Act. The IRS issued guidance in Notice 2009-82 providing plans with relief from any potential claims of operational defects associated with implementing the RMD suspension. We ask that similar guidance be issued here.

5. Clarify the Definition of Participants affected by COVID-19 for Purposes of the Applicable CARES Act Provisions. A number of CARES Act relief provisions are available for participants affected by COVID-19. However, clarification is needed regarding how those participants can be determined. For example, the CARES Act defines "affected participants" as including participants who test positive for COVID-19, or whose spouse or a dependent tests positive, using a CDC-approved test. As a practical matter, participants who are advised by a medical professional that they have tested positive would have no way to know whether the test is CDC-approved. Moreover, individuals may present with symptoms or other indicators (e.g., a chest X-ray) that would lead a medical professional to diagnose them as likely to have a COVID-19 infection, and to direct them to self-quarantine without a test being administered (e.g., because tests are not readily available and are being limited to specified individuals). Guidance should be provided that would allow those individuals to be deemed to be affected by COVID-19 so that the participant may access the relief provided by the CARES Act.

B. COVID-19 Related Health & Welfare Issues.

1. Expand the Definition of "Infectious Diseases" in Notice 2004-23. The immediate IRS guidance in Notice 2020-15 that a HDHP/HSA could offer COVID-19 testing (and even treatment) without imposing a deductible was welcome—and, in our view, an important confirmation of the infectious disease testing already permitted as a safe harbor for a HDHP/HSA arrangement under the Screening Services appendix to IRS Notice 2004-23. We encourage the Agencies to adopt a broader and all-inclusive definition of "Infectious Diseases" through an update to Notice 2004-23 so that testing for all infectious diseases (whether triggered through a pandemic, public health emergency, or other unanticipated event) is permissible—since it is only a matter of time until another infectious disease makes it way around the globe. We also suggest that the Agencies clarify that the expanded definition of "Infectious Diseases" applies to plan years beginning on and after January 1, 2019. The Agencies should also consider permanently extending the allowance under IRS Notice 2020-15 for a HDHP to cover treatment costs for patients suffering from an infectious disease – the temporary allowance will help to mitigate the current crisis, but in the future plan sponsors will be able to pivot and adapt more quickly if this flexibility is made permanent.

2. Except Telemedicine from ACA and ERISA Requirements. Telemedicine has made great strides over the past month, but is still subject to a number of regulatory shackles that make its widespread, uniform adoption difficult for all employees across a nationwide workforce. To this point, the Tri-Agencies should treat telemedicine (under its broad definition in the CARES Act) as an excepted benefit that is not subject to the dictates and requirements of the Affordable Care Act or ERISA. Telemedicine, given its limited nature, is best considered to be similar to a HIPAA excepted benefit such as an on-site medical clinic, separate limited benefits, coverage for a specific disease or illness, or supplemental coverage. While there may be a number of illnesses that can be diagnosed or treated through telemedicine, the traditional nature of hands-on medical treatment, blood draws, setting broken bones, or stitching a wound are all absent in and impossible with, telemedicine. Indeed, any reasonable evaluation of telemedicine benefits, which are often contracted to and run by

vendors separate from health plans, are simply incompatible with many ACA requirements, such as 1st dollar coverage for vaccines (which cannot be administered remotely). As a result – and in accordance with the CARES Act, which both created a safe harbor for telemedicine and instructed that it be disregarded for HDHP/HSA purposes – telemedicine should be treated as an excepted benefit that can be offered as a supplement to employees and dependents who are eligible for traditional group health coverage and also to employees (and their dependents) who are ineligible for any employer group health coverage without suffering any additional ACA entanglements. It should also not trigger any of the traditional ERISA reporting and disclosure requirements as long as the employer makes a one-time "excepted benefit" filing similar to the existing top-hat filings.

3. Relax Telemedicine State Licensing Requirements. Telemedicine still also suffers from the strictures of state licensing requirements and the need to use physicians licensed in the same state as the patient. HHS leadership is critical here to unlock the availability of care across the country. We urge HHS to recognize that antiquated licensing and physical presence restrictions, in the year 2020 and when faced with a global (much less national) pandemic such as COVID-19, present a barrier to interstate employment and commerce and, as such, should be superseded by overarching federal regulation. HHS action could permit an employee in one corner of the country to visit via telemedicine with a physician anywhere in the United States. The Centers for Medicare and Medicaid (CMS) has already undertaken similar actions to streamline telehealth services for Medicare beneficiaries; HHS should now apply these rules to the private sector as well.

4. Clarify the Effective Date of the CARES Act Telemedicine Provisions. The effective date of the CARES Act telemedicine provision is unclear—and many vendors or insurers were already offering broad and free telemedicine as a response to growing COVID-19 concerns. Here, again, in order to ensure that plans that took prompt action to address the crisis (many of which have plans that do not run January to December) are operating in the clear, the Tri-Agencies should clarify that the CARES Act telemedicine provisions are effective for plan years beginning on and after January 1, 2019.

5. Adopt a Safe Harbor for Determining Full Time Employees under the CARES Act Employee Retention Credit. The CARES Act provides up to $5,000 in refundable tax credits per eligible employee for certain eligible employers (1) whose trade or business operations fully or partially shut down due to COVID-19-related government orders, or (2) who experience a 50% decline in gross receipts (or operations, for tax-exempt employers) as compared to the corresponding calendar quarter in 2019. The credit applies to 50% of the qualified wages. The treatment of qualified wages varies by the number of full-time employees, and the new law references in the ACA Shared Responsibility determination of full-time employees. Rather than forcing employers to dig deeply again (and quickly) into the depths of ACA issues and iterations, we urge the Agencies to adopt a safe harbor allowing employers to use the same determination of full-time employees that was used for 2019 ACA Shared Responsibility reporting (or relief from reporting) purposes.

II. Requests to Tri-Agencies with Regard to Issues Beyond the March 2020 COVID-19 Legislation and Guidance

With regard to issues beyond the March 2020 COVID-19 legislation and guidance, we request that the Tri-Agencies (where appropriate, separately, or jointly, as the case may be):

- Waive the requirement for notarization of spousal consent
- Allow changes in status under cafeteria plans
- Extend the "Use-It-Or-Lose-It" Rule for health care and dependent care spending accounts
- Provide temporary ACA Employer Mandate relief
- Condition provider balance billing upon identification of non-network status
- Remove the mandatory 60-day advance notice requirement for benefit enhancements

Each request with regard to issues beyond the March 2020 COVID-19 legislation and guidance is further explained below. These requests are identified either as a retirement plan issue or a health and welfare issue.

A. Retirement Plan Issues Beyond March 2020 COVID-19 Legislation and Guidance

1. Waive the Requirement for Notarization of Spousal Consent. Existing law and regulations require spousal consent to be witnessed in the physical presence of a notary public or plan representative (Section 417(a)(2)(A)(iii) of the Internal Revenue Code and Treas. Reg. Sec. 1.401(a)-21(d)(6)(ii)). However, regulations delegate to the Commissioner of the IRS the discretion to provide that the use of certain procedures will be deemed to satisfy the physical presence requirement (Treas. Reg. Sec. 1.401(a)-21(d)(6)(ii)i)). The IRS should exercise its discretion to issue guidance recognizing alternative procedures (for example, video or internet-based meetings) that can satisfy the physical presence requirement. Due to the COVID-19 crisis, many employers have closed non-essential administrative offices and other locations with many working in a remote work environment. Similarly, many employees are isolated for health reasons, practicing social distancing, or unable to travel due to mass transit cutbacks, which makes it difficult to meet in the physical presence of a plan representative or notary public. Thus, the IRS should recognize that widely available, secure technology can be utilized to satisfy the physical presence requirement.

B. Health & Welfare Issues Beyond March 2020 COVID-19 Legislation and Guidance

1. Allow Changes in Status Under Cafeteria Plans. Many, if not most, employees pay their share of health plan and other related premiums on a pre-tax basis under Internal Revenue Code Section 125 and cannot, absent limited circumstances, change those elections during the course of a plan year. Likewise, Exchange plans and private health insurance policies are similarly limited with regard to changes that can be made during the duration of a policy or a calendar year. We call upon the Tri-Agencies to recognize that an emergency declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act should allow impacted individuals to make a new election for new health coverage, different health

coverage, or no health coverage at all for a 60 day period of time chosen by the employer or insurer. This should apply to any plan year beginning on or after January 1, 2019, and ending on or after December 31, 2021.

2. Extend the Use-It-Or-Lose-It Rule for Health Care and Dependent Care Spending Accounts. For many years now participants in health care and dependent care spending accounts have had to either use their account balances with expenses incurred during the course of a plan year—or forfeit the remainder. However, the use-it-or-lose-it rule driving these forfeitures is purely a regulatory construct—which has been modified by the same regulators to now include a 2-1/2 month grace period and also a $500 rollover exception to the rule. We observe that many individuals—particularly with plan years ending this Spring or Summer—will not be able to visit physicians to receive elective services that they anticipate paying for with their health care account. Or, others are now unable to use their dependent care account balances as child care services are closed and/or the parent is at home and unable to leave the house to go to work—and, hence, ineligible to submit currently incurred expenses. We propose that the Agencies permit plans to offer affected workers the opportunity to reconsider their elections during the current plan year. Failing that, participants should be able to submit expenses incurred during the first 90 days of plan year #2 against the goal amount of their account(s) established in plan year #1. Further, any expenses incurred after the end of plan year #1 should not prevent the participant from participating in a tax-advantaged health savings account as of the first day of plan year #2. This should apply to any plan year beginning on or after January 1, 2019, and ending on or after December 31, 2021. The Agencies should also consider giving plan sponsors the ability to extend the grace period, and increase the rollover exception during these plan years.

3. Provide Temporary ACA Employer Mandate Relief. The Shared Responsibility rules of the ACA never anticipated that employees might not be able to work due to government order for a period of time during which employers may or may not be able to afford to offer health coverage. Other employers may not be able to afford to pay employees while continuing to offer health care at employee rates to individuals on furlough, etc. The combinations are endless, and easily create offer, eligibility, affordability, or stability period issues under the ACA Shared Responsibility rules. As such, we propose that the Agencies temporarily suspend Shared Responsibility rules, requirements, and taxes for events occurring during calendar 2020. Further, to the extent 2020 circumstances impact 2021, we propose that employers be able to use any reasonable method of averaging out periods in cases where employees did not work in 2020, or worked significantly in excess of their pre-COVID-19 work schedules.

4. Condition Provider Balance Billing Upon Identification of Non-Network Status. Medical/Industrial complex interests are attempting to undermine employer group health plan cost and quality management techniques by forcing employers to pay too much for services provided by non-network providers – including for COVID testing services that are now mandated under the CARES Act to be covered with no cost-sharing or medical management imposed by the plan. This will have the result of raising costs for self-insured plans, resulting in increased premiums for beneficiaries in the following plan years. We call upon the Tri-Agencies to prevent non-network providers from frustrating the legitimate interest of employer group health plan cost and quality management techniques.

Employers should be able to build, monitor, and modify their in-network provider structures in a way that best serves their participants and directs scarce plan dollars to the best network of quality physicians—and even refuse to pay for ANY services provided by a non-network provider (much like a HMO). To this end, we urge that the Tri-Agencies issue guidance that requires any provider to identify, upon request, that it is a non-network provider before the receipt of services by a participant. Failure to identify their non-network status will mean that they are ineligible for ANY reimbursement by a group health plan, and cannot balance bill the participant. Upon identification of their non-network status, the provider shall be entitled to receive reimbursement by an employer group health plan of no more than 2x Medicare reimbursement rates, unless an employer voluntarily determines that its reimbursement rates are higher. Further, the Tri-Agency guidance should make clean that any non-network providers availing themselves of said reimbursement from an employer plan are prohibited from balance billing participants for any service delivered during this episode of care.

5. Remove the Mandatory 60-day Advance Notice Requirement for Benefit Enhancements. Summaries of Benefits and Coverage (SBCs) have always had a limited utility, particularly for employers that take great pains to describe the health plan options available to plan participants. Now, as a result of mandated and optional benefit expansions under the pressures of COVID-19, it is also apparent that the mandatory 60-day advance notice requirement has made SBCs an actual impediment to responding to this declared national emergency. As such, we call upon the Tri-Agencies to drop any SBC requirement surrounding advance notice of benefit enhancements. Instead, such enhancements should follow the long-established ERISA rule requiring no sooner than a 60-day trailing notification of a material modification.

III. Common Issues.

The requests below for i) extended notice and filing deadlines under ERISA and the Internal Revenue Code, and ii) e-delivery, affect both retirement, health and welfare plans and are relevant to both the March 2020 COVID-19 legislation and guidance and beyond.

A. Extend Notice and Filing Deadlines Required by ERISA. The recently enacted CARES Act amended Section 518 of ERISA to expand the Department of Labor's (DOL) authority to extend notice and filing deadlines for up to one year in the case of public health emergencies as declared by the Secretary of Health and Human Services. Such a public health emergency has been declared for the COVID-19 crisis, and plan sponsors are facing unprecedented demands responding, both in terms of ensuring the health and safety of their employees as well as responding to rapidly deteriorating business conditions. In addition, personnel for many plan sponsors and relevant third-party providers (recordkeepers, trustees, auditors, actuaries, and legal counsel, etc.) are transitioning to a remote working environment that will further impact their ability to timely complete required notices and filings. For these reasons, the DOL should exercise its authority to extend the notice and filing deadlines for a wide range of required notices and filings otherwise required by ERISA, including, without limitation, the following:

1. Annual Funding Notice. The annual funding notice required for pension plans pursuant to Section 101(f) of ERISA in 2020 should be delayed for at least three months (note that April 29 is the due date for calendar year plans).

2. Form 5500. The due date for Forms 5500 that are due for the rest of 2020 should be automatically extended for all filers without the need to file a Form 5558. That extended due date should be pushed out by three months (at least), or if later, until December 15, 2020. This would allow a non-calendar plan with a standard extended Form 5500 due date in April-September 2020 to have until December to file, and a calendar year plan would have until January of 2021 to file. Summary annual reports should be pushed back accordingly.

3. Summary of Material Modifications. The July 31 due date (for calendar year plans) for publishing summary description of material modifications to a plan required pursuant to 29 CFR § 2520.104b-3 should be extended by at least three months.

In addition, we propose that for any plan year beginning on or after January 1, 2019, and ending on or after December 31, 2021, all other filing deadlines, ERISA participant notification and document production deadlines, and Affordable Care Act Exchange requirements should be extended by at least three months.

B. Extend Notice and Filing Deadlines Required by the IRS. Consistent with the extension of federal tax filing deadlines and in light of the circumstances described in “A” (above), the IRS should extend the deadlines for required notices and filings, including, without limitation, the following:

   1. Determination Letters: The current window to request a favorable determination letter for an individually designed “hybrid” defined benefit plan under Rev. Proc. 2019-20 closes on August 31, 2020. This filing window should be extended by at least six months.

C. E-Delivery. The Tri-Agencies have, for far too long, been mired in a 20th century mentality that paper and expensive first-class postage is best, that electronic notifications should be rare, and can be delivered only through a desktop computer are difficult for common Americans to receive. Not only have electronic communications become mobile (via laptops, tablets, and smartphones) and deeply embedded in all aspects of our culture, but they have also become the medium of choice in the current situation where individuals are concerned about going to post offices or other mailing areas to send mail, and possible virus vectors resulting from receiving mail. Just as a US Post Office postmark was the gold standard for delivery in the past century, it is time for the Tri-Agencies to recognize that electronic delivery of all IRS, DOL, and HHS-required documents to participants is the new gold standard for the 21st century. As such, the Tri-Agencies should immediately adopt a notification safe harbor that recognizes any document delivered to a participant’s electronic location of choice, or sent via a first class mail postcard with a direction to a website, is delivered as certainly as if it had been postmarked. This safe harbor, however, should not be temporary and should apply to notices under retirement, health, and welfare plans. Subject to comment and modification, it should be immediately effective and continue until superseded by permanent rules.

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ERIC member companies are helping their employees by providing financial and other assistance to them when needed most. We urge you to issue guidance as soon as possible to provide appropriate relief for these

companies. We appreciate the opportunity to provide feedback at this time. If you have questions concerning our COVID-19 requested guidance, or if we can be of further assistance, please contact us at (202) 789–1400 or arobinson@eric.org or jgelfand@eric.org.

Sincerely,

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James Gelfand
Senior Vice President, Health Policy

CC: Charles Rettig, Commissioner, Internal Revenue Service
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Carol Weiser, Benefits Tax Counsel, Treasury Department
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