

December 15, 2009

The Honorable Harry Reid Majority Leader United States Senate Washington, DC 20510 The Honorable Mitch McConnell Republican Leader United States Senate Washington, DC 20510

Dear Majority Leader Reid and Republican Leader McConnell:

As the Senate continues to consider the Patient Protection and Affordable Care Act, I am writing to share the views of the American Benefits Council (Council) – an association representing primarily large employers and other organizations that sponsor directly or administer health and retirement plans covering more than 100 million Americans.

We are increasingly concerned that the legislation appears to be moving further away from the essential goals we set forth a year ago and which have been at the core of our consistent message to Congress and the President throughout the health reform debate. As stated in our November 30 letter to you and your Senate colleagues, we continue to believe that fundamental health reform is essential, but it must be done right.

We are unable to support the Senate bill in its current form and are increasingly disturbed that significant progress has yet to be made to address the problems it poses for employer-sponsored health care. Without significant improvements, we will have no alternative but to oppose the legislation as it is considered further by the Senate.

Our views on health care reform are grounded firmly in the belief that it must not limit the flexibility and innovation that are the foundation of our employer-based system. In particular, legislation must not destabilize employer-sponsored coverage by making it more costly or burdensome. The vast majority of employers want to continue providing health coverage for their employees, but might no longer be able to do so when faced with unrealistic new requirements or financial commitments.

Our experience is that there is tremendous value to having employers actively engaged in our health care system, developing effective strategies for meeting the health care needs of employees and their families, seeking greater accountability and value as health care purchasers and making health care coverage more affordable by subsidizing its costs to employees who would otherwise be faced with purchasing it on their own.

We strongly urge that the following improvements be made to the Senate bill:

- Eliminate the Tax on Retiree Drug Subsidies As part of the Medicare Modernization Act of 2003, Congress established a limited subsidy for employers that maintain prescription drug coverage for Medicare-eligible retirees and excluded these payments from taxation. These provisions were specifically included to encourage employers to maintain these valuable benefits for retirees and thereby also save the federal government money. Consequently, if the favorable tax treatment of these payments to employers is eliminated it will unquestionably result in fewer employers sponsoring this benefit and will increase Medicare's costs for providing the same benefit through the Part D program. Moreover, it will result in a significant increase in liabilities for these companies – and commensurate losses in their earnings -- because financial accounting rules would require companies to immediately restate their financial liabilities and take a charge to earnings as of the date health reform legislation is signed into law to reflect the present value of the loss of the current tax treatment. The Senate was not aware of these accounting implications when this provision was included in the legislation. It is inconceivable that in the current economic climate, the Congress and President Obama would consider a provision that will upset financial markets, make it more difficult for companies to borrow funds, force millions of retirees out of their employer-sponsored coverage and unquestionably result in a net revenue loss to the government.
- Delete the Annual Taxes on Insurers, Self-insured Plans and Other Stakeholders The Senate bill includes more than \$100 billion in "fees" over the next ten years to be paid by insurers, third-party administrators of self-insured health plans, and pharmaceutical and medical device manufacturers. These amounts would initially apply to revenues that had been received in 2009, resulting in an immediate disruptive effect in the marketplace. Similarly, premium taxes to fund reinsurance programs for the individual insurance market and comparative effectiveness research should be deleted and these very worthwhile features of health reform legislation should not be funded by assessments that will directly result in increased premiums. The Congressional Budget Office has correctly advised Congress that these forms of taxes are highly likely to be passed along in the form of higher prices to employers and employees for health care services. Provisions that will directly add to health care costs are contrary to the principles set forth by the President and Congressional leaders from the outset of this debate and should be removed from the Senate bill.
- Make the High Cost Plan Excise Tax Fairer and Less Disruptive The Senate bill includes a 40 percent excise tax on the total value of all health-related coverage above \$8,500 (singles) and \$23,000 (families). Large numbers of employer plans (both public and private) are certain to exceed the new tax thresholds, not because they offer "Cadillac" or "gold-plated" benefits, but simply because health care costs are increasing by an average of 7 or 8 percent a year while the tax thresholds would be indexed by one percent over the Consumer Price Index (CPI + 1) and therefore will increase at a much lower rate than health care costs. Health plan costs may also be higher than average due to geographic variations, the average age of the workforce and for health benefits offered to retirees. Because of these factors, eventually a large number of employers could face payment of the 40 percent excise tax unless significant benefit plan changes, to the detriment of American families, are made to avoid these costs.

While several important improvements to this tax were made by the Senate Finance Committee and in the bill proposed by the Majority Leader, these modifications are not sufficient to avoid substantial disruption to employer-sponsored plans, and inequitable results for employees and retirees. We strongly urge that the thresholds be increased further, an annual index be used that reflects increases in health costs, retiree health coverage and employee contributions to coverage not be subject to the tax, and that supplementary benefits not be included for tax purposes.

- Strengthen Cost and Quality Reforms –The Council has repeatedly stated that if legislation ensures coverage for all Americans, but fails to sufficiently address the issues of cost and quality, then health care reform will have been both a great achievement and a devastating missed opportunity. As you know, our reform proposals call for an individual mandate that all Americans must have coverage, and we applaud this element of the legislation. Likewise, we welcome those provisions included in the Senate bill that will help make health care more affordable and improve quality. However, much more still can and should be done. We support inclusion of the provisions developed by a group of freshmen Senators to strengthen the cost and quality provisions in the legislation. We urge that they also include the release of Medicare data on a non-patient identifiable basis so that employers can develop appropriate tools to identify and reward high performing health care providers. We also strongly encourage adequate funding for the essential quality improvement initiatives that have already been included in the Senate bill.
- Expand Choice through Competing Private Health Plans, Not a Public Plan Option We have consistently urged that the right approach to expanding health care choice is by achieving a more competitive and responsible private health insurance market. Indeed, working toward that goal and fulfilling the many significant new regulatory responsibilities that the government will be assuming in a reformed system will be challenging enough without the added burden to the government of establishing and administering another major health insurance program of its own. The government's role should be to see that the right conditions exist for robust and fair private market competition in the reformed health care market in order to ensure better value, better service and a better range of health plan options for all Americans. There also are many significant issues around a possible Medicare buy-in for pre-65 retirees, including conditions of eligibility other than age, the cost and affordability of the coverage, the impact of additional enrollees on the solvency of Medicare and the possible increase in cost-shifting to employers resulting from more individuals enrolled in a program that generally pays rates for health care services that are well below those of private payers. All of these issues would need to be appropriately resolved before we could conclude that a Medicare buy-in is an appropriate way to resolve the coverage needs of pre-65 retirees.
- Encourage All Individuals to Obtain Coverage -- A reformed and stable insurance market requires broad participation so that individuals do not wait to obtain health insurance only when they have an imminent need for medical care. Achieving broad participation in the insurance market requires a combination of affordable coverage including low-cost catastrophic coverage and adequate financial incentives to encourage as many individuals as possible to obtain and maintain continuous health coverage. The Senate bill appropriately makes lower cost catastrophic coverage available to young adults and those

who are not able to afford more comprehensive plans. But we encourage these plans to be more broadly available to allow more individuals to have coverage that meets their needs and ability to afford coverage. We are very concerned that the assessments for not obtaining coverage under the Senate bill are likely to be insufficient to encourage early and continuous enrollment in health coverage by as many individuals as possible.

- Allow for Up to a 90-Day Waiting Period and Do Not Include Seasonal or Temporary Employment in Definition of Full-Time Work We also urge that employers not be penalized for short initial waiting periods up to 90 days (a particularly important issue for high turnover industries) and that the definition of "full-time" employees exclude temporary and seasonal workers. Penalty-free waiting periods, such as would be provided by an amendment proposed by Senator Landrieu, will help many employers with high numbers of short-term workers to be able to continue sponsoring benefits for their employees Similarly, an amendment by Senator Cantwell would appropriately recognize that the definition of full-time employment should not include those who have only a limited connection to the workforce. Both of these proposals would also help mitigate the disincentives employers would have to hire new workers.
- Include Meaningful Medical Liability Reform No version of health care reform, including the Senate bill, has yet met the test of achieving the kind of real reform that is urgently needed in our medical liability system. The Congressional Budget Office has recently confirmed that there would be substantial savings to the federal government if meaningful liability reform were included as part of health reform legislation; and that the savings in the private marketplace would be even greater than those for the federal government. Responsible health reform legislation simply must not ignore this pressing issue.

Remove the CLASS Act Provisions – We believe that the CLASS Act and other approaches to meeting these needs should be more thoroughly examined by Congress before the establishment of a major new entitlement obligation for the federal government. This is particularly important since Social Security and Medicare already face critical shortfalls. These essential programs will likely compete for adequate resources with programs established by the CLASS Act if there are premium shortfalls to fund the benefits of this new federal obligation. While we support the need for public and private efforts to address the long-term care needs of disabled and elderly individuals, we do not believe that there is a broad consensus that the CLASS Act represents the most appropriate means to accomplish this shared goal.

We also have several concerns regarding possible changes to the Senate bill that, if adopted, would make it much more burdensome for employers to continue providing health coverage:

• Oppose Limits on Employer Flexibility to Determine Benefits and Contributions -- We are very concerned that ultimately, if unintentionally, the cumulative effect of rigid "pay-orplay" requirements will lead some companies to decide simply to "pay" a penalty rather than "play (i.e. sponsor a health plan). This would reduce active engagement by employers and their important role as innovative and demanding purchasers of health care services. In particular, we strongly urge that the Senate not approve any amendments that would

penalize employers unless they meet prescriptive, "one-size-fits-all" coverage requirements or make minimum contributions to coverage.

• Provide Catastrophic Coverage Options, Not Vouchers, If Employer Coverage is Not Affordable – The Senate bill creates a category of individuals whose employer coverage is deemed "unaffordable" under the standards of the legislation, but who are nonetheless not eligible for subsidies in the exchanges. Senator Wyden has proposed to address this issue in a manner that would be highly destabilizing to employer-sponsored coverage, and it appears likely to be included in the version of the legislation brought to the Senate for a vote. His proposal would require employers to give these workers a voucher equal to the largest contribution an employer makes to any plan it sponsors and the employees could use the voucher to purchase coverage in the exchange and also keep on a tax free basis any amount by which the voucher exceeds the cost of the coverage.

A much more appropriate way to address this situation, in addition to any possible modifications to eligibility for subsidies in the exchanges, would be to allow those individuals who are not able to afford coverage offered under an employer plan to purchase low-cost catastrophic coverage (which includes comprehensive coverage for preventive care and access to primary care services). The amendment that Senator Collins has proposed along these lines, should be adopted and also apply to the category of employees described above. This would truly help individuals obtain affordable coverage without destabilizing the employer-sponsored system.

Of course, any other possible proposals to require employers to provide vouchers even more expansively to employees who decline coverage under their employer plan should be summarily rejected. Under such approaches, employees who remain in the employer's plan would lose the value of the premium contributions from their co-workers who opt-out and obtain coverage in the insurance exchanges.

Maintain the ERISA Framework for Employer-Sponsored Coverage – The regulatory framework established by the Employee Retirement Income Security Act of 1974 (ERISA) makes it possible for multi-state employers to provide uniform benefits to their employees and consistently administer these essential benefits without being subject to conflicting state or local regulations. We urge that no amendments be adopted that would undermine the ability of employers to maintain and administer their plans as uniformly and efficiently as possible. We also urge that no provisions be included that would permit state waivers of ERISA since this would also lead to state-by-state regulation of employer-sponsored selfinsured plans and would significantly increase the cost and complexity of health benefits sponsored by multi-state employers. Finally, it is essential for employers that health reform legislation maintains ERISA's uniform, federal law remedy framework and not replace it with state law remedies that would expose employers to unacceptably high costs and excessive litigation. It is indefensible that Congress would even consider provisions that would increase the potential liability (and the corresponding increase in health costs) associated with the sponsorship or provision of health coverage; while neglecting altogether medical liability reform that, as noted previously, the Congressional Budget Office has said would help reduce health care costs.

We share your conviction that health care reform is a national priority and that is why we remain committed to working to see that it is done right. We remain dedicated to that shared goal, but we are equally convinced that unless health care reform gets the fundamentals right, employers will be compelled to oppose any measure that would make their vital role in our health care system more costly, more burdensome or less effective for their employees.

Sincerely,

James A. Klein President

cc: Senate Members