April 30, 2010

The Honorable Kathleen Sebelius
Secretary
Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

The Honorable Hilda Lucia Solis
Secretary
Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

The Honorable Timothy Geithner
Secretary
Department of Treasury
1500 Pennsylvania Avenue, NE
Washington, DC 20220

Dear Secretary Sebelius, Secretary Solis, and Secretary Geithner:

The undersigned organizations, representing employers and health plans, are committed to working with Congress, the Administration and federal regulatory agencies to implement the Patient Protection and Affordable Care Act (PPACA). Our members are working to make the necessary changes required to assure a smooth transition for the people they serve.

We recognize that the appropriate federal agencies are working diligently to quickly issue rules on many of the reforms in advance of their effective dates. However, given the September effective dates for the near-term requirements (e.g., no lifetime or annual limits, bans on cost-sharing for preventive services, dependent coverage changes, etc.) employers and health plans will be making coverage and policy decisions either in the absence of final regulations or with little time between the issuance of rules and the effective date of the new law. These changes include policy and contract revisions, IT system upgrades, modifications to employee benefit and marketing materials and development of employee and customer communications, just to name a few.

Given the amount of changes required, the uncertainty regarding the content of many pending rules, and the short time frame, we respectfully request that the applicable federal agencies provide affected entities with a good faith compliance standard as proposed in the attached document entitled, “Transition Period and

Good Faith Compliance Standard under the PPACA Regulations." We feel this standard, similar to those issued in the past, will provide the compliance environment to allow us to move forward in a spirit of partnership while we implement the numerous provisions of the law.

We greatly appreciate your consideration of this request and are pleased to meet with you to discuss our proposal in greater detail. Please let us know how we may be of assistance.

Thank you for your consideration of this important issue.

Sincerely,

American Benefits Council
Blue Cross Blue Shield Association
Healthcare Leadership Council
HR Policy Association
National Association of Health Underwriters
National Association of Manufacturers
National Association of Wholesaler-Distributors
National Business Group on Health
National Federation of Independent Business
National Retail Federation
National Small Business Association
Society for Human Resource Management
U.S. Chamber of Commerce

Attachment

Transition Period and Good Faith Compliance Standard Under the PPACA Regulations

I. Summary

The federal agencies administering the Patient Protection and Affordable Care Act ("PPACA" or the "Act") should provide employers and insurers a reasonable transition period to comply with the myriad of regulations that will be issued in connection with the PPACA. Specifically, we request that:

- Regulations relating to the PPACA should apply no earlier than to plan years beginning on or after the date that is 6 months after the date the final regulation is issued. And, the regulations should provide that for the period before the regulation's applicability date, plans and insurers will be treated as satisfying PPACA if they operate in good faith compliance with a reasonable interpretation of the Act's requirements.

- To the extent an agency issues a regulation with a more accelerated applicability date than that proposed above, we request that the good faith standard articulated above also apply for purposes of statutory and regulatory compliance for the first plan year to which the regulation applies.

This transition period will provide a reasonable amount of time for employers and insurers to adopt required plan and policy amendments (and any required filings with insurance regulators), avoid mid-year plan changes for a group health plan, and provide time for employers and insurers, and their service providers, to make changes required by the regulation to their administrative systems.

The "good faith compliance" standard requested in this circumstance would be different than a typical "non-enforcement policy" in that it would be the applicable standard for public and private enforcement of PPACA for a transition period until final regulations are applicable (or for the first plan year for which the regulation is applicable, in the event the regulation has an accelerated applicability date, as discussed above). Although such a standard is unusual and broader than the typical non-enforcement policy, it is well warranted given the unprecedented sweep of reforms. And, as explained in Section II below, such a standard is within the discretion of the agencies to adopt, and such a standard would likely receive some deference as a matter of administrative law.

Importantly, "good faith compliance" does not equate to non-compliance. It would refer to actions taken by an insurer or plan sponsor that substantially comply with the requirements of PPACA, as reflected by the insurer or sponsor's timely amendment of policies and plan documents to comply with the clear requirements of PPACA and the implementation of such administrative changes as necessary to administer the policies and plans in accordance with such amendments. In the event that the good faith

compliance period extends beyond the regulation's applicability date, good faith compliance would be demonstrated by the plan sponsor or insurer's reasonable actions to come into compliance with the regulation during the transition period. Such a standard would minimize the risk that insurers or employers would be subject to liability for good faith actions taken in compliance with the PPACA which did not anticipate every nuance or interpretation set forth in subsequently-issued regulations.

Without assurance that good faith efforts to comply with PPACA to implement its provisions within a reasonable period of time is sufficient, and given the current level of confusion and uncertainty of the law and its regulations regarding the near-term requirements, some employers and plans may take steps to reduce their liability risks by eliminating benefit or coverage options about which there is ambiguity or significant interpretive issues. And employers may be reluctant to establish new plans, which would be subject to the myriad of new rules about which there are a substantial number of regulatory issues to be addressed. The good faith compliance standard would further benefit plan participants and consumers by helping to ensure a smoother transition to the new rules.

Proposed language for a good faith compliance standard is set forth in Section III, below.

II. Discussion

An agency's adoption of a non-enforcement policy is presumptively exempt from judicial review under § 702 of the Administrative Procedures Act ("APA"). *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("[a]n agency's decision not to take enforcement action should be presumed immune from judicial review under [APA] § 701(a)(2)"). Agencies frequently adopt non-enforcement policies. *See Mental Health Parity; Interim Rules HIPAA Mental Health Parity Act; Proposed Rule*, 62 Fed. Reg. 66931, 66956 (Dec. 22, 1997) (under certain circumstances no enforcement action will be taken against group health plans that in good faith attempt to comply with certain sections of Act); *Modifications to the Electronic Data Transaction Standards and Code Sets*, 68 Fed. Reg. 8381, 8384 (Feb. 20, 2003) (reserving authority to "penalize noncompliance" with the standards to those entities that fail to make reasonable efforts to comply during an interim period); *FTC Enforcement Policy: Identity Theft Red Flags Rule*, 16 CFR 681.2, available at http://www.ftc.gov/os/2008/10/081022idtheftredflagsrule.pdf, (Oct. 22, 2008) (delaying the implementation of the Red Flag rule from November 1, 2008 to May 1, 2009 to allow covered entities to adopt appropriate programs); *Telemarketing Sales Rule*, 69 Fed. Reg. 67287, 67290 (Nov. 14, 2004) (FTC "will forbear from bringing any enforcement action for violation" of the Telemarketing Sales Rule against certain telemarketers pending completion of review of policy)

But, a non-enforcement policy extends only to the issuing agency, and does not bind other parties. *See, e.g.*, Mental Health Parity and Addiction Equity Act ("MHPAEA") regulations, 75 Fed. Reg. 5410 (February 2, 2010) (stating that although DOL, HHS, and IRS would take into account good faith efforts to comply with the statute

before the regulation's applicability date, nothing in such policy would preclude participants from bringing suit under ERISA).

The PPACA is the most sweeping healthcare reform law in U.S. history, and requires insurers and plan sponsors to make many significant policy and plan changes in a very short time period. Given the timing of the PPACA's passage and the massive amount of regulation that is under development at HHS, DOL and IRS, it is unlikely that the agencies will be able to issue all relevant regulations before policy and plan changes are required to comply with the PPACA. This is especially so for insurers, who must file policy changes with states well in advance of the September 23, 2010 compliance date for many provisions of PPACA. Accordingly, insurers and plans could be exposed to liability for changes required by PPACA regulations issued after the date of policy or plan changes, which could not have been anticipated.

Rather than adopting a non-enforcement policy which would still leave insurers and plan sponsors exposed to liability, the agencies should adopt, as part of the regulation itself (not the preamble), a rule providing that good faith efforts to comply with the PPACA during a specified transition period constitutes compliance with the PPACA.[1] Such a rule would be the applicable regulatory standard that would apply in private litigation, and would assist insurers and plans in minimizing liability for good faith actions taken before regulations are issued and during the specified transition period, given that agency action likely would be afforded some degree of deference under *Chevron* and its progeny, as discussed below.

Although a good faith compliance standard would be unusual, the agencies likely have the authority to adopt such a standard in the regulations they issue under the PPACA. The PHSA expressly provides broad rulemaking authority to HHS (and DOL and Treasury have similar authority under ERISA and the Internal Revenue Code), and "[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of any rules to fill any gap left, implicitly or explicitly, by Congress. *Chevron v. Nat'l Resources Defenses Council*, 467 U.S. 837, 843 (1984). *See also Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 980 (2005) (agency's subsequent interpretation of an ambiguous statute is binding on courts, notwithstanding a court's earlier, contrary, interpretation); *School Dist. of the City of Pontiac v. Sec'y of U.S. Dep't of Education*, 584 F.3d 253, 272 (6th Cir. 2009)("agencies generally have broad power to interpret and administer law[.]").

There are a number of examples where courts and agencies have held that "substantial" or "good faith" compliance with a federal law constitutes compliance, and

[1] The insurance market reforms of subtitles A and C of Title I the PPACA require that insurers and plans make myriad of changes to their plans and these provisions are incorporated into ERISA via a new section 715 of ERISA. As such, a non-enforcement policy would not preclude participants from suing insurers and plans under ERISA § 502 for alleged failures to comply with the PPACA.

such standards applied not only to agency enforcement, but private litigation. In fact, there are a number of examples that apply to laws affecting health plans.

For example, prior to the issuance of COBRA regulations, the courts held that good faith compliance sufficed to establish compliance with the statute. *DeGruise v. Sprint Corp.*, 279 F.3d 333, 336 (5th Cir. 2002) (in the absence of regulations, employers are required to operate in good faith with a reasonable interpretation of the COBRA statute. Good faith "merely obligates employers to use means 'reasonably calculated' to reach participants[,]" which the employer satisfied by mailing the letter via certified mail).

Indeed, the IRS adopted a good faith compliance test in its 1987 proposed COBRA rules, 52 Fed. Reg. 22716-01, 22716-17 (June 15, 1987). Specifically, the IRS provided a specified 3-month window during which a plan that operated in "good faith" with a reasonable interpretation of the statute would be deemed to comply. The IRS did not provide any examples of what it would deem "good faith" compliance. The Service also stated that it "would not consider actions inconsistent with the terms of [the] proposed regulations necessarily to constitute a lack of good faith compliance . . . ." The IRS cited no statutory authority for this administrative interpretation.

DOL has also recognized a "good faith compliance" standard in connection with COBRA. In DOL Adv. Op. 99-14A (Nov. 10, 1999) and ERISA Technical Release 86-2, DOL found that in the absence of regulations, it would deem the mailing of a single COBRA election notice to the last known address of a covered employee and his dependents as good faith compliance with COBRA's notice rules. Courts have relied upon DOL's administrative interpretation in adopting a "good faith" compliance standard with respect to COBRA. *See Johnson v. Northwest Airlines, Inc.*, 2001 WL 210480 (N.D. Cal. Feb. 23, 2001) (Discussing cases adopting a good faith compliance standard for COBRA, and noting that "[t]hese [cases] are supported by the Department of Labor rules concerning COBRA notices. *See* Dept. of Labor ERISA Opinion Letter 99-14A, November 10, 1999 (single initial notice to all beneficiaries at same last known address is sufficient); DOL ERISA Technical Release 86-2, 1986 (where spouse's last known address is the same as the covered employee's, "[DOL] will consider a single mailing addressed to both the employee and spouse to be good faith compliance").

Courts have adopted a similar "substantial compliance" standard in evaluating compliance with ERISA's claims procedure regulation. *Sage v. Automation, Inc. Pension Plan & Trust*, 845 F.2d 885 (10th Cir. 1988) (not every procedural defect upsets the decision of a plan representative; plan's failure to describe what additional information was needed to perfect the claim did not prejudice plaintiffs, where the plan provided the plaintiffs with the opportunity to make their arguments and to present evidence); *Arnold v. Hartford Life Ins. Co.*, 527 F. Supp.2d 495, 503 (W.D. Va. 2007) ("[S]trict compliance with the ERISA regulations is not the standard; instead, what is generally required is substantial compliance with those regulations." Insurer's failure to provide notice of voluntary appeal procedures did not prejudice claimant, where insurer informed claimant of the denial and the grounds for such denial); *Goldman v. Hartford Life Life & Accident Ins. Co.*, 417 F. Supp. 2d 788, 804 (E.D. La. 2006) (plan's failure to adjudicate a claim

within the time required by DOL regulation did not undermine the adequacy of the plan administrator's decision-making process or the adequacy of the adverse benefit determination, which detailed at length the grounds for the administrator's decision). DOL has, through regulations, attempted to administratively overrule the substantial compliance test in the context of the ERISA § 503 claims regulations, *see* 63 Fed. Reg. 48397 (Sept. 9, 1987) (no deference if claims procedure not strictly followed), which indicates that DOL has the authority to adopt such a test by regulation if it chooses to do so. Indeed, in subsequent FAQs interpreting the regulation, the DOL loosened this standard by indicating that a plan's mistakes in its claims procedure that do not prejudice a participant will not cause the plan to lose deference in subsequent litigation involving that participant.[2] DOL *Frequently Asked Questions about the Benefits Claim Procedure Regulation*, FAQ F-2. As such, DOL adopted a variation of substantial compliance in connection with a private enforcement action under ERISA § 502(a)(1)(B), and this same FAQ has been favorably cited by courts. *See Bechtol v. Marsh & McLennan Companies, Inc.*, 2008 WL 238588, *3 (W.D. Wash. Jan. 28, 2008) (quoting FAQ for holding that that "[n]ot every deviation by a plan from the requirements of the regulation justifies proceeding directly to court . . . [However,] deviations not susceptible to meaningful correction through plan procedures . . . would justify a court determination that the plan failed to provide a reasonable procedure").

In HIPAA, Congress included a good faith compliance standard in the statute with respect to the nondiscrimination rules set out in ERISA § 702, PHSA § 2702 and Code § 9802. The statute provided no guidance as to what would constitute "good faith compliance," and the agencies, without direction from Congress, unilaterally extended this "good faith compliance" period indefinitely. *See* 62 Fed. Reg. 16894-01, 16907 and 16940 (April 8, 1997). And, in its 2001 Interim Final Regulations, DOL continued an indefinite good faith compliance period for bona fide wellness programs until further guidance was issued. 66 Fed. Reg. 1378-01, 1379 (January 8, 2001) (describing good faith compliance as compliance with the agency's proposed regulations).

DOL also adopted a good faith compliance standard with respect to pension benefit statements required under ERISA § 105(a) (as amended by § 508(a) of the Pension Protection Act of 2006 (the "PPA")). *See* DOL Field Advisory Bulletin ("FAB") 2006-03 (December 20, 2006) (expressing DOL's view that, in the absence of regulations, DOL will treat a plan administrator as satisfying the requirements of ERISA § 105(a) "if the administrator has acted in good faith compliance with a reasonable interpretation of [the statutory] requirements[,]" and detailing the form and manner in which benefit statements would be deemed to be in good faith compliance with the PPA. DOL also adopted, in FAB 2009-01 (February 10, 2009), a good faith compliance standard in connection with defined benefit plan funding notices required under ERISA § 101(f) (as amended by PPA § 501(a)). Specifically, DOL stated that pending the issuance of

[2] We note that just last week, the Supreme Court held that a "single honest mistake" in interpreting a plan does not suffice to strip a plan administrator of deference available under the plan. *Conkright v. Frommert*, 599 U.S. __ (April 21, 2010), Slip Opinion at 5, 9-10.

regulations, DOL would "treat a plan administrator as satisfying the requirements of section 101(f), if the administrator has acted in accordance with a good faith, reasonable interpretation of those requirements with respect to matters not specifically addressed in [the FAB]."

Although good faith generally "is an intangible and abstract quality with no technical meaning or statutory definition," *Blacks Law Dictionary*, 6th Ed. at 693, it encompasses, among things, "honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage." *Id.* And, good faith compliance standards have been recognized in contexts other than those involving health plans. For example, in addressing the availability of punitive damages, the Supreme Court interpreted Title VII of the Civil Rights Act of 1964 to provide a good faith compliance exception that protects an employer from vicarious liability for discriminatory employment decisions made by its managerial agents in violation of the employer's good faith efforts to comply with Title VII. To satisfy this good faith compliance standard, an employer must adopt antidiscrimination policies and make a good faith effort to educate its employees about such policies. *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545-46 (1999).

Similarly, the Fair Labor Standards Act ("FLSA") has a safe harbor provision that insulates employers from liquidated damages if the employer can establish that it made good faith efforts to comply with the FLSA. To satisfy the good faith requirement, an employer must show that it acted with both subjective and objective good faith, and "upon such reasonable grounds that it would be unfair to impose upon [it] more than a compensatory verdict." *Bozeman v. Port-O-Tech Corp.*, 2008 WL 4371313, *15 (S.D.Fla. Sept. 19, 2008). To demonstrate the subjective component, an employer must show that it had "an honest intention to ascertain what the FLSA requires and to act in accordance with those requirements." Proving the objective component of the good faith defense requires the employer to demonstrate that it had a reasonable belief that its conduct conformed with the FLSA. *Wajcman v. Investment Corp. of Palm Beach*, 620 F. Supp. 2d 1353, 1359 (S.D. Fla. 2009) (citations omitted).

Adopting the good faith compliance standard set forth herein would be consistent with this line of cases, given that a policy or plan would have to be timely amended to comply with the PPACA's clear requirements (thus reflecting a subjective intent to comply), and the policy or plan would have to be administered in accordance with those amendments (reflecting an objective intent to comply).

III. Proposed Language

We propose the following applicability date and good faith compliance standard, to be included in a PPACA regulation itself (not the preamble):

> Applicability Date: This regulation shall become applicable for plan years beginning on or after the date that is six (6) months after publication of this regulation in the Federal Register. For the period before the applicability date of this regulation, a plan or insurer will be considered in

compliance with PPACA if the plan or insurer has sought to comply in good faith with a reasonable interpretation of PPACA's requirements.

For purposes of this regulation, "good faith" refers to actions by a plan or insurer that are intended to substantially comply with the requirements of PPACA, as reflected by the plan or insurer's timely amendment of plan documents and/or policies to comply with the clear requirements of PPACA, and the implementation of such administrative changes as are necessary to administer the plan or policy in accordance with such amendments.

In the event the regulation's applicability date is earlier than the first plan year beginning on the date that is six months after publication, we propose the following applicability date and good faith compliance standard be included in the regulation itself (not the preamble):

Applicability Date: This regulation shall become applicable for plan years beginning on or after the date that is [ ] days after publication in the Federal Register. For the period before the applicability date of this regulation and for the first plan year for which the regulation is applicable, a plan or insurer will be considered to be in compliance with PPACA and this regulation if the plan or insurer has sought to comply in good faith with a reasonable interpretation of PPACA and the regulation's requirements.

For purposes of this regulation, "good faith" refers to actions by a plan or insurer that are intended to substantially comply with the requirements of PPACA, as reflected by the plan or insurer's timely amendment of plan documents and/or policies to comply with the clear requirements of PPACA, the implementation of such administrative changes as are necessary to administer the plan or policy in accordance with such amendments, and the plan or insurer's reasonable actions to come into compliance with the regulation during the transition period.