M E M O R A N D U M

To: Barbara B. Weyher, Esq., Chair
Douglas J. Brocker, Esq., UPL Counsel
Other Members of the Authorized Practice Committee

From: Brian H. Graff, Esq., Executive Director of ASPA

Re: Allegations of the Unauthorized Practice of Law by Retirement Plan Professionals in North Carolina

Date: December 13, 2002

A. Statement of Interest

_____, of _____ ("_____"), is a member of the American Society of Pension Actuaries ("ASPA"), and has provided us with a copy of a letter from Ms. Weyher, on behalf of the Authorized Practice Committee ("Committee"), alleging that _____ is engaged in the unauthorized practice of law with respect to certain retirement plan services _____ provides to North Carolina businesses. Other employees of _____ are also members of ASPA. Further, a number of employees of_____, another firm that received a similar letter from the Committee, are members of ASPA as well. In total, ASPA has approximately 100 members residing in North Carolina providing retirement plan services on behalf of the businesses and citizens in North Carolina. Other members of ASPA work for large national financial institutions outside of North Carolina that also provide retirement plan services in North Carolina. The members of ASPA and the firms they work for help thousands of businesses in North Carolina provide retirement benefits for their employees. The longstanding business practices of all of these members and their firms would be dramatically affected if the Committee continues to allege that the wide variety of retirement plans services described in the letter constitutes the unauthorized practice of law.

By way of background, ASPA is a nonprofit professional society whose purpose is to educate retirement plan professionals and to preserve and enhance the private retirement system. ASPA sponsors numerous educational programs that lead to professional designations demonstrating expertise in the retirement plan field. For example, ASPA cosponsors the examinations of the Joint Board for the Enrollment of Actuaries, which

must be completed to attain Enrolled Actuary status.[1] ASPA also sponsors examinations leading to the designations of Qualified 401(k) Administrator (QKA), Qualified Pension Administrator (QPA), and Certified Pension Consultant (CPC).[2] Other professionals (*e.g.,* licensed attorneys and accountants) can become an Associated Professional Member (APM) of ASPA if they can provide evidence of three years experience in pension-related matters.[3] All designated ASPA members are subject to a mandatory continuing education requirement. ASPA members are also subject to a Code of Conduct and violations of the Code can lead to public discipline and possibly even expulsion.

The membership of ASPA consists of nearly 5,000 of these retirement plan professionals who provide actuarial, consulting and other retirement plan administrative services to businesses, many of which are small businesses, sponsoring retirement plans for their employees. ASPA members , like the retirement plans they serve, are located throughout the United States, and the plans they work with provide retirement benefits to millions of American workers.

ASPA participated as an *amicus* in 1990 before the Supreme Court of Florida in a similar case regarding the question of whether nonlawyer activities relating to employee benefit plans constitute the unauthorized practice of law. ASPA has also interceded in such cases considered by the Bars of other States, including Alabama, South Carolina, and Virginia. In all of these cases, the result was to permit retirement plan professionals and firms, like the ones alleged to have engaged in the unauthorized practice of law in the Committee's letters, to continue to assist businesses in establishing and maintaining retirement plans for their employees.

ASPA strongly believes that the current position of the Committee as articulated in the letter to _____ is incorrect and misguided. As discussed below, the extremely broad list of services described in such letter simply do not constitute the unauthorized practice of law, as defined by the General Statutes of North Carolina. Second, even if certain activities might arguably constitute the unauthorized practice of law under North Carolina law, North Carolina is prohibited from restricting retirement plan services that are specifically authorized by Federal law. Finally, contrary to protecting the interests of the general public as this law is intended, the continued maintenance of the Committee's current position would in fact be detrimental to the citizens of North Carolina since it most certainly would lead to fewer North Carolina workers being covered by an employer-sponsored retirement plan.

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[1] *See* Proposed Reg. Part 901, Enrolled Actuary Examinations (Fed. Reg. Feb. 28, 1983).
[2] A copy of our complete retirement plan professional education program is attached for your review.
[3] ASPA counts among its members many lawyers, and several members of ASPA's Board of Directors are attorneys at some of the most prominent employee benefit firms throughout the country.

B. The Retirement Plan Services Broadly Described by the Committee do not Constitute the Unauthorized Practice of Law

The Committee's letter to _____ specifically requests that _____ agree to "refrain from any future unauthorized practice of law in North Carolina, including:

> (1) advising, counseling, or recommending to any entity that a particular profit-sharing, deferred compensation, pension, or other retirement plan is appropriate to that entity's particular circumstances or that it should adopt and implement such a plan; or
> (2) preparing, drawing, drafting, amending, restating, or aiding in such processes of any documents necessary to implement such a plan.

Beginning with clause (1), this overbroad restriction would prohibit virtually any consulting activity relating to a retirement plan. For example, it would prevent: (a) a certified public accountant from demonstrating the tax savings that could be generated by a client business if they considered the adoption of a retirement plan; (b) an enrolled actuary from counseling a client regarding the different funding obligations required for various types of retirement plans; and (c) a certified pension consultant from advising a client on the amount of retirement benefits that could be generated for employees through different kinds of plans. None of these activities comes close to what can be understood as the traditional practice of law, nor should they be considered the unauthorized practice of law in North Carolina.

Sections 84-4 through 84-10 of the General Statutes of North Carolina describe the "unauthorized practice of law." Section 84-4 is most relevant:

> Section 84-4; Persons other than members of the State Bar prohibited from practicing law: Except as otherwise permitted by law, it shall be unlawful for any person or association of persons, except active members of the Bar of the State of North Carolina admitted and licensed to practice as attorneys-at-law, . . .to hold out himself, or to prepare legal documents, or as being engaged in advising or counseling in law or acting as attorney or counselor-at-law, or in furnishing the services of a lawyer or lawyers; and it shall be unlawful for any person or association of persons except active members of the Bar, for or without a fee or consideration, to give legal advice counsel, perform for or furnish to another legal services, or to prepare directly or through another for another person, firm or corporation, any . . .instrument of trust, or to organize corporations or prepare for another person, firm or corporation, any other legal document. N.C. Gen. Stat. Section 84-4 (2000).

Nothing in North Carolina statutes suggests that the application of clear and settled law is the practice of law. However, clause (1) of the Committee's proposed restriction on nonlawyer activities regarding retirement plans would essentially prohibit financial consulting respecting retirement plans merely because the financial calculations involved are framed by clear legal rules. For example, the maximum annual contribution to a

defined contribution plan on behalf of any individual employee is currently $40,000. Assuming a 40 year old business owner receiving such a contribution each year until age 65 and assuming a reasonable rate of return on investments, a nonlawyer retirement plan professional could calculate what the business owner could reasonably expect to have as an account balance at retirement if such a plan were adopted. The Committee's current position would prohibit such a calculation by a nonlawyer. Taken to its extreme, the Committee's interpretation of North Carolina law would arguably prohibit a department store clerk from calculating statutorily prescribed sales tax on a simple purchase by a customer. North Carolina law certainly does not intend such a result.

The determination as to whether to adopt a retirement plan and which type of plan to adopt is a significant financial decision for a small business. For example, a small business could consider offering a SIMPLE plan or a 401(k) plan for its employees. A SIMPLE plan has a set per employee contribution limit and requires the employer to provide a specified level of nonelective or matching contribution. A 401(k) plan provides a higher per employee contribution limit and more flexibility with respect to employer contributions provided that each year a purely mathematical nondiscrimination test is satisfied. There are no questions of law involved. The rules are settled and the only real questions are basically how much does the small business want to spend and what level of benefits for employees is desired. Clause (1) of the Committee's proposed restriction on nonlawyer activities respecting retirement plans covers services that are simply not the practice of law within the meaning of the North Carolina statute.

Clause (2) of the Committee's proposed restriction on nonlawyer activities respecting retirement plans is admittedly somewhat more complicated. This is because in addition to the various types of retirement plans available to a business, there are different types of documents that can be used to implement such plans.

An individually designed plan is a plan and trust document specially drafted to meet the particular needs of the plan sponsor. Such plans are typically used by larger businesses needing a customized plan to meet the diverse needs of their workforce.

In order to reduce administrative costs, however, virtually all plans adopted by small businesses utilize either a prototype or volume submitter plan document. A "prototype plan" is a plan that is made available by a sponsor for adoption by employers. A prototype plan consists of a basic plan document and an adoption agreement. *See generally* IRS Rev. Proc. 2000-20, 2000-6 I.R.B. 553 (2/7/2000). The "basic plan document" is the umbrella document that governs the provisions of all plans adopted under the prototype plan. The basic plan document can incorporate a trust or custodial account agreement the provisions of which are applicable to all adopting employers, or a separate trust or custodial account document prepared by the sponsoring organization can be used. The "adoption agreement" is a fill-in-the blanks document completed by the employer adopting the prototype plan by which the employer makes choices as to particular options permitted under the basic plan document. Examples include contribution levels, whether to allow for plan loans, and the length of vesting schedule desired. The adopting employer may not make changes to the provisions in the basic

plan document; otherwise it will no longer be considered a prototype plan. The prototype plan must be maintained by a "sponsoring organization." A sponsoring organization is usually a retirement plan service provider such as a financial institution, third party administration firm (like _____), CPA firm, or an actuarial firm. A prototype plan must be submitted to the IRS National Office for approval, and once approved, the IRS will issue an opinion letter to the sponsoring organization approving the prototype. Once approved, employers adopting the prototype plan can rely on the opinion letter that the prototype satisfies the requirements of the Internal Revenue Code. *See generally* IRS Announcement 2001-77, 2001-30 I.R.B. 83 (7/23/2001).

For all practical purposes, a "volume submitter" plan operates the same as a prototype plan. A volume submitter plan consists of a specimen plan and optional provisions that may be used in the specimen plan. *See generally* IRS Rev. Proc. 2000-6, Section 9 2000-1 I.R.B. 187 (1/3/2000). The specimen plan and the optional provisions must be submitted to the IRS Regional Office for approval. Once approved, the IRS issues an advisory letter to the volume submitter sponsor. Volume submitter plans are sponsored by organizations like those that sponsor prototype plans. As with prototype plans, employers adopting the pre-approved language of the volume submitter plan can rely on the advisory letter that the volume submitter satisfies the requirements of the Internal Revenue Code. *See generally* IRS Announcement 2001-77, 2001-30 I.R.B. 83 (7/23/2001). Employers adopting either a prototype or volume submitter plan are free to obtain an individual determination letter from the IRS confirming the plans compliance with the Internal Revenue Code if they so choose.

We strongly do not believe that a nonlawyer (like _____) assisting a small business in adopting an IRS pre-approved prototype or volume submitter plan represents the unauthorized practice of law. Even the American Bar Association Standing Committee on the Unauthorized Practice of Law acknowledged that prototype plans should be viewed differently.[4] The ABA Opinion recognizes "that for some employers the adoption of a . . . prototype plan may be the only economically feasible method of providing pension benefits for their employees." The ABA Opinion provides that nonlawyers may provide pre-approved prototype plans to employers. In so doing, the nonlawyer sponsor of a pre-approved prototype plan may represent generally that an employer's plan may qualify if the optional provisions adopted by the employer satisfy IRS requirements. Additionally, the nonlawyer sponsor may provide plan descriptions, employee handbooks, and other forms incidental to the pre-approved prototype plan. However, the ABA Opinion provides that the nonlawyer sponsor of a pre-approved prototype plan may not represent to the employer that the prototype plan would be suitable in all circumstances for the employer's situation, or advise the employer that the plan if adopted would qualify for tax benefits or be in compliance with the Employee Retirement Income Security Act (ERISA). Although we believe that the ABA Opinion is too restrictive, particularly given that the IRS specifically allows adopting employers to rely on a pre-approved prototype or volume submitter plan as satisfying the requirements

[4] *See generally* American Bar Association Standing Committee on the Unauthorized Practice of Law, Final Opinion on Employee Benefit Planning (October 17, 1977) (the "ABA Opinion"), Section X. The opinion was issued prior to the use of volume submitter plans, but the rationale applies to such plans as well.

of the Internal Revenue Code, it is nonetheless instructive that even in 1977 the ABA believed a broad restriction on nonlawyer retirement plan services, like those currently being proposed by the Committee, was inappropriate. The ABA recognized that a nonlawyer assisting with the completion of an adoption agreement for a prototype plan should not constitute the unauthorized practice of law.

When an employer adopting a prototype plan completes an adoption agreement, the employer is merely choosing from among various choices clearly permitted by law. As noted earlier, the employer could be choosing whether to allow plan loans, the length of the vesting schedule, whether to allow immediate participation or require employees to wait one year, or the formula for the matching contributions. All of the options provided in the adoption agreement are clear choices permitted by law. An adoption agreement is merely a form used to implement the underlying prototype document. It is analogous to an application for insurance in which the client, with the assistance of the broker, makes choices with respect to different elements of coverage permitted by the underlying insurance policy. The drafting of the underlying insurance contract might arguably constitute the practice of law. Assisting a client prepare an insurance application would not. Like the completion of that insurance application, nonlawyer assistance to employers adopting IRS pre-approved prototype or volume submitter plans, which would be prohibited by clause (2) of the Committee's proposed restriction on nonlawyer activities respecting retirement plans, does not constitute the unauthorized practice under the laws of North Carolina.

C. North Carolina is Prohibited from Restricting Retirement Plan Services by Nonlawyers Authorized by Federal Law

Even if certain activities by nonlawyers discussed above arguably constitute the unauthorized practice of law, North Carolina is specifically preempted from regulating such activities by Federal law. In 1990, the Supreme Court of Florida rejected a proposed advisory opinion of the State bar concerning nonlawyer activities respecting retirement plans, the breadth of which was virtually identical to the Committee's proposed restriction on nonlawyer retirement plan services contained in the letter to _____. That court declared:

> It is apparent that pension plan preparation and administration is a field of practice that requires the knowledge and expertise of lawyers, CPAs, actuaries, and insurance professionals. Further the federal government, through acts of Congress, particularly ERISA and provisions of the Internal Revenue Code, as well as through regulations implementing congressional acts, clearly intends to protect pension plan beneficiaries. These federal statutes and regulations expressly allow nonlawyers to practice before federal agencies. . . Clearly, we cannot prohibit authorized professionals from preparing and presenting the necessary documents to federal agencies before which they are admitted to practice. *The Florida Bar re Advisory Opinion—Nonlawyer Preparation of Pension Plans*, 571 So.2d 430, 433 [S.Ct. FL (1990)].

The Committee's proposed restrictions on nonlawyer retirement plan services would apply to actions required for the establishment, maintenance, and administration of federally regulated retirement plans. The Committee's interpretation of North Carolina law would mean that all employee benefit plan fiduciaries, all statutory plan administrators, all CPAs, and all enrolled actuaries who perform the functions necessitated under the governing federal statutes and regulations would be engaged in the unauthorized practice of law in North Carolina.

The Committee's construction of the unauthorized practice of law in North Carolina would directly limit a Federal grant of authority permitting nonlawyers–enrolled actuaries, certified public accountants, and other employee benefits professionals–to practice before the Internal Revenue Service, the Department of Labor and the Pension Benefit Guaranty Corporation. The Committee's proposed construction of North Carolina law is thus contrary to and preempted by Federal law as well as inconsistent with controlling decisional law.

Pursuant to authority granted by Congress, lawyers and nonlawyers are authorized to practice before those Federal agencies that administer ERISA. By virtue of the Supremacy Clause of the Constitution of the United States, North Carolina "may not deny to those failing to meet its own qualifications the right to perform the functions within the scope of the federal authority." *Sperry v. State of Florida,* 373 U.S. 379, 385 (1963).

In *Sperry,* the Florida Bar sought a declaration that the preparation and prosecution of patent applications for others constitutes the practice of law, and that such conduct by a nonlawyer could be enjoined as the unauthorized practice of law. In particular, the Florida Bar sought to enjoin nonlawyers from "preparing, drafting and construing legal documents" as well as prosecuting the applications for letters patent. *Sperry,* 372 U.S. 382. The Supreme Court of the United States refused to enjoin that conduct by nonlawyers because that conduct was authorized by Federal statute and Federal regulations.

In *Sperry*, the Court held that, under Florida law, the nonlawyers' activities did constitute the practice of law, that Florida had a substantial interest in regulating the practice of law without a license, but that State law had to yield, when it was incompatible with Federal legislation. On remand, the Supreme Court of Florida recognized that practice before a Federal agency necessarily includes "advising, assisting and representing applicants" and "rendering opinions." *State ex rel. The Florida Bar v. Sperry*, 159 So.2d 229, 230 (Fla. 1963).

In *Sperry,* the United States Supreme Court held:

> A State may not enforce licensing requirements which, though valid in the absence of federal regulation, give 'the State's licensing board a virtual power of review over the federal determination' that a person or agency is qualified and entitled to perform certain functions, or which impose upon the performance of

> activity sanctioned by federal license additional conditions not contemplated by Congress.

Sperry, 373 U.S. 385.

In *Sperry,* the Court also highlighted the fact that "despite protest of the bar, Congress in enacting the Administrative Procedure Act refused to limit the right to practice before the administrative agencies to lawyers. . ." *Id.,* 373 U.S. 388. The Committee's current proposed restriction in nonlawyer activities respecting retirement plans appears to be trying to accomplish indirectly that which Congress has forbidden to be done directly. The Committee's proposed restriction would conflict directly with Section 555(b) of the Administrative Procedure Act, which provides that every party shall be accorded the right to "appear in person or by or with counsel or other duly qualified representative in an agency proceeding."

Lawyers as well as nonlawyers are authorized by Federal statute and regulation to perform acts and services that specifically, according to the Committee's letter to _____, would constitute the unauthorized practice of law in North Carolina. Thus, under Federal law, certified public accountants, as well as attorneys, are deemed eligible to represent others before the IRS, due to their professional qualifications. 5 U.S.C. § 500(b), (c). The Committee's interpretation of North Carolina law would prohibit certified public accountants from representing North Carolina businesses before the IRS. For example, it would prohibit a certified public accountant from representing a North Carolina client on the application for a retirement plan determination letter from the IRS. The Committee's proposed restriction on nonlawyer retirement plan services would put North Carolina law in conflict with Federal law, where the Federal law governs.

In addition, the Secretary of the Treasury is specifically authorized to qualify other nonlawyers to practice before the IRS. 31 U.S.C. § 330. So, for example, enrolled actuaries are specifically authorized to practice before the IRS on matters that relate to employee benefit plans. *See* Treas. Circular 230, 31 C.F.R. Part 10. The Department of Labor and the PBGC have granted similar authority to nonlawyers. *See* ERISA Proc. 76-1 (authorizing nonlawyers to represent others before the Department of Labor regarding requests for advisory opinions and information letters); 29 C.F.R 2606.6 (authorization to represent others before the PBGC). The Committee's proposed restriction on nonlawyer activities respecting retirement plans would put North Carolina law in conflict with Federal statute and the rules of three Federal agencies, where the Federal law governs.

Pursuant to 31 C.F.R. Subtit1e A, Part 10, § 10.1(a), the Office of Director of Practice is established in the Office of the Secretary of the Treasury of the United States. Under § 10.3(e), "[a]ny person qualifying under § 10.7 or § 10.5(c) may practice before the Internal Revenue Service."

Section 10.2 provides the definitions for the rules governing the authority to practice before the Internal Revenue Service. The expression "practice before the Internal Revenue Service" is one of those terms that is defined. "Practice before the Internal

Revenue Service" comprehends all matters connected with presentation to the Internal Revenue Service or any of its officers or employees relating to a client's rights, privileges, or liabilities under laws or regulations administered by the Internal Revenue Service. Such presentations include **the preparation and filing of necessary documents, correspondence with and communications to the Internal Revenue Service, and the representation of a client at conferences, hearings, and meetings**." (Emphasis added.)

The "necessary documents" in the retirement plan field include the plan documents themselves and plan amendments because the requirement for such plans are governed primarily under provisions of the Internal Revenue Code, which are found under Title II of ERISA. Thus, the IRS has authorized any firm "at least one of whose members is authorized to practice before the [IRS] with respect to employee plan matters" to provide prototype plans to its clients. IRS Rev. Proc. 89-13, Section 4.03, 1989-1 C.B. 801.[5]

The IRS recently published a publication, *Choosing a Retirement Solution for Your Small Business* [IRS Publication 3998 (2002)]. This IRS publication describes the benefits that small business can attain through the adoption of a retirement plan and the types of plans available. In this publication, the IRS makes clear its intent and understanding that nonlawyers will make available prototype plans to small businesses. Specifically, the publication provides that "[m]any financial institutions and pension practitioners make available one or more prototype retirement plans that have been pre-approved by the IRS." When specifically discussing 401(k) plans the publication notes that "financial institutions and other organizations offer prototype 401(k) plans which can greatly lessen the administrative burden on individual employers of establishing and maintaining such plans." This IRS publication reflects the Federal authorization of nonlawyers to provide retirement plan services to businesses, including assisting with the adoption of necessary plan documents. The Committee's proposed restriction on nonlawyer retirement plan services would serve to obstruct a Federal program encouraged by the IRS to "greatly lessen the administrative burden on individual employers of establishing and maintaining such plans."

The sweep of the Committee's interpretation of the unauthorized practice of law in North Carolina would dictate that employee benefit plans be run exclusively by lawyers because so much of what relates to those plans under the governing Federal statutes is included within your interpretation. ERISA dictates that only a statutory plan administrator can provide the Federal government with plan termination notices, that only an enrolled actuary can provide the Federal government with certifications of plan asset sufficiency, and that only independent auditors can prepare annual reports for the federal government about plan assets and compliance with party-in-interest transactions. All of these functions arguably under the Committee's interpretation would be outlawed in North Carolina, unless lawyers performed them.

[5] IRS Rev. Proc. 89-13 has been modified by IRS Rev. Proc. 2000-20, 2000-6 I.R.B. 553 (2/7/2000). However, IRS Rev. Proc. 2000-20 specifically states that its definition of "sponsor" is based on the definition in IRS Rev. Proc. 89-13, and thus the reference to IRS Rev. Proc. 89-13 is instructive as to the IRS' current intent.

The Committee's interpretation and application of the North Carolina rules of the unauthorized practice of law plainly seeks to limit the federally authorized preparation of pension plan documents by nonlawyers for presentation to the IRS. Such an interpretation obstructs the free use of a Federal right granted under ERISA and the Administrative Procedures Act.

ERISA is "designed to provide safeguards with respect to the establishment, operation and administration" of employee benefit plans. *Fine v. Semet,* 514 F. Supp. 34, 41 (S.D. Fla. 1981), *aff'd*, 699 F.2d 1091 (11th Cir. 1983). In order to foster those safeguards and promote the establishment and maintenance of retirement plans, Congress took the steps to ensure Federal supremacy through national uniformity in the area of employee benefit plans.

In order to establish national uniformity, Congress expressly provided that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). ERISA's preemption provision is "deliberately expansive and designed to 'establish pension plan regulation as exclusively a federal concern.' " *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 46 (1987). The express provisions of ERISA and the decisional law thereunder demonstrate that the Committee's interpretation and application of North Carolina law would be preempted under ERISA.

ERISA Section 514–the preemption clause–"is conspicuous for its breadth. 'Its deliberately expansive' language was 'designed to establish pension plan regulation as exclusively a federal concern.' " *Pilot Life Insurance Co. v. Dedeaux,* 481 U.S. 41, 46 (1987), *quoting, Alessi v. Raybestos-Manhattan,* 451 U.S. 504, 523 (1981). The key to ERISA Section 514 is found in the words "relate to," and the congressional decision to "use those words in their broad sense, rejecting more limited pre-emption language that would have made the clause 'applicable only to state laws relating to the specific subjects covered by ERISA.' Moreover, to underscore its intent that § 514(a) be expansively applied, Congress used equally broad language in defining the 'State law' that would be preempted." *Ingersoll-Rand Co. v. McClendon,* 498 U.S. 133, 12 Employee Benefits Cas. (BNA) 2737, 2739 (U.S. 1990). Such state laws include "all laws, decisions, rules, regulations, or other State action having the effect of law," ERISA Section 514(c)(1), 29 U.S.C. § 1144(c)(1).

Under this broad definition, "a State law may 'relate to' a benefit plan, and thereby be preempted, even if the law is not specifically designed to affect such plans, or the effect in only indirect." *Pilot Life,* 481 U.S. 47. Here, the existence of a benefit plan is a critical factor in establishing liability under the State law. A State law 'relates to' an ERISA plan, if it has a connection with or reference to such a plan." *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 47. The North Carolina law in question "relates to" employee benefit plans where, as here, the Committee is using it expressly to invalidate a Federal right with respect to the administration of ERISA plans–including, but not limited to, assisting with the preparation of those documents required by Federal law necessary in order to adopt an employee benefit plan. "As a result, the State cause of action relates not merely

to pension benefits, but to the essence of the pension plan itself." *Ingersoll-Rand v. McClendon,* 12 Employee Benefits Cas. (BNA) 2740. The United States Supreme Court has not hesitated to enforce ERISA's preemption provision where state law created the prospect that plans would be subject to conflicting requirements of state law. *Fort Halifax Packing Co., Inc. v. Coyne,* 482 U.S. 1, 10 (1987).

"Under § 514(a), ERISA pre-empts any state law that refers to or has a connection with covered benefit plans. . . 'even if the law is not specifically designed to affect such p1ans, or the effect is only indirect,' and even if the law is 'consistent with ERISA's substantive requirements.' " *quoting Ingersoll-Rand, 498* U.S. 139 and *Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 739 (1985)(emphasis supplied). *District of Columbia v. Greater Washington Board of Trade,* 16 Employee Benefits Cas. (BNA) 1001, 1003 (U.S. 1992). The Committee's reading of North Carolina law also runs afoul of this pronouncement of the Supreme Court.

ERISA is a reticulated statute, carefully crafted to provide regulatory consistency of ERISA plans without regard to where they are administered, where their participants and beneficiaries reside, or where their sponsoring employers are located. The Committee's proposed application of North Carolina law would undermine this federally required uniformity. It would supplant Federal uniformity with a patchwork quilt of State regulation, where a plan's consultant could perform Federally mandated functions in one State that would be unlawful in another. Congress clearly enacted the preemption clause in ERISA to invalidate State intervention of the kind proposed by the Committee in its letter to _____.

D. The Committee's Current Position Will Discourage Small Business Retirement Plan Coverage and thus is Contrary to the Public Interest

As a matter of public policy, the importance of encouraging the establishment and maintenance of workplace retirement plans by North Carolina's employers cannot be overstated. It is well recognized that employees covered by a workplace retirement plan are much more likely to have accumulated retirement savings than those employees not so covered. *See Pension Issues: Small Employer Plans,* Congressional Research Service—Code RL31085, 20 (2001). Still, only an estimated 57 percent of full-time American workers over age 21 participate in a workplace retirement plan, based on 1999 data. *See id.*, 7. This policy problem is significantly more acute with respect to small business employees. Small business employers are much less likely to sponsor a workplace retirement plan than their larger firm counterparts. According to data from the U.S. Bureau of Labor Statistics, 64 percent of all employees at firms with more than 100 participants are covered by a retirement plan. *See* U.S. Department of Labor, Bureau of Labor Statistics, "Employee Benefits in Private Industry," *News,* U.S.D.L. 01-473 (December 2001). By contrast, only 34 percent of employees at firms with less than 100 employees are covered by a retirement plan.

The low rate of retirement plan sponsorship has been a topic of ongoing concern to Congress, chiefly because over 40 percent of American workers are employed by small

businesses. *See Pension Issues: Small Employer Plans,* Congressional Research Service—Code RL31085, 2 (2001). Since the passage of ERISA, Congress has enacted several provision designed to encourage small business retirement plan coverage. For example, as part of the *Small Business Job Protection Act of 1996* Congress created the SIMPLE plan for small business, which is exempt from some of the regulations and administrative procedures applicable to large employer plans.

Most recently, Congress has focused on the administrative costs associated with establishing and maintaining a retirement plan as a barrier to small business retirement plan coverage. In a recent survey of small businesses without a retirement plan, almost one-third indicated that the costs of setting-up and administering a plan were a major reason for not offering a plan to employees. *See 2002 Small Employer Retirement Survey-Summary of Findings (SERS Survey),* Employee Benefit Research Institute, 4 (2002). In response to this concern, Congress enacted, as part of the *Economic Growth and Tax Relief Reconciliation Act of 2001*, a tax credit for small businesses with fewer than 100 employees to offset some of the administrative costs of establishing a new retirement plan. The importance of promoting small business retirement plan coverage, and the concerns about plan administrative costs, are reflected in the report of the Senate Finance Committee, which reported out this provision. The report states:

> One of the reasons some small employers may not adopt a tax-favored retirement plan is the administrative costs associated with such plans. The Committee believes that providing a tax credit for certain administrative costs will reduce one of the barriers to retirement plan coverage.[6]

According to the SERS Survey of small businesses without a retirement plan, 20 percent of such businesses feel that the tax credit for plan administrative costs makes a retirement plan much more attractive.

The Committee's proposed restriction on nonlawyer activities respecting retirement plans would significantly increase the cost of setting-up and administering a retirement plan. The breadth of the Committee's proposed restriction on nonlawyer retirement plan services, would, for all practical purposes, require the involvement of a lawyer whenever a small business is considering or implementing a retirement plan for its employees. This would appear to apply in even the most basic of circumstances, such as the potential adoption of a SIMPLE plan by a small business. The result of the Committee's position would be to increase the costs to small businesses of setting-up and administering a retirement plan by hundreds, and more likely thousands, of dollars. This would ultimately lead to fewer small business employees being covered by workplace retirement plans.

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[6] *See Restoring Earnings to Lift Individuals and Empower Families (RELIEF) Act of 2001—Technical Explanation of Provisions,* Senate Finance Committee, Report 107-30, 93 (May 2001). The *RELIEF* Act was renamed the *Economic Growth and Tax Relief Reconciliation Act of 2001* in the House-Senate Conference on the measure.

Further, there is no policy justification for this added cost. No data exists suggesting that there is widespread occurrence of mistakes being made by nonlawyers assisting with the implementation and administration of retirement plans in North Carolina, or the entire country for that matter. There is no doubt that from time to time mistakes may be made and some retirement plans may fall out of compliance with the requirements of ERISA. Given the myriad of rules governing the various types of retirement plans available this is not surprising. In fact, the IRS recognizes that relatively minor errors in the administration of retirement plans can occur and has developed a program, called the Employee Plans Compliance Resolution System, where employers with the help of their retirement plan service providers can self-correct such errors without incurring excessive administrative costs. *See* IRS Rev. Proc. 2002-47, Part IV (2002).

There is no evidence, however, suggesting that a lawyer is in any better position to either prevent or deal with these errors than a qualified nonlawyer retirement plan professional. Lawyers in North Carolina are not required to demonstrate any expertise in the retirement plan field in order to become members of the Bar. By contrast, other professionals—for example enrolled actuaries, certified pension consultants, qualified pension administrators, and qualified 401(k) administrators—are required to take examinations that require extensive knowledge of retirement plan rules. *See generally ASPA Education and Examination Program Catalog* (2002). Further, many of these nonlawyer professionals are subject to mandatory continuing education specific to retirement plan issues. While lawyers in most states are subject to mandatory continuing education, there is certainly no requirement that such continuing education be concentrated in the retirement plan field.

The intent of the North Carolina unauthorized practice of law statute is to protect the citizens of North Carolina against incompetence and dishonesty in an area of activity affecting general welfare. *State v. Pledger,* 257 N.C. 634, 127 S.E.2d 337 (1962). Thus, with respect to any particular area of activity, in order for the unauthorized practice of law statute to apply there should be a showing that lawyers have a unique and special competency in the area above other nonlawyers practicing in the same area. In other words, unless there is some evidence that lawyers are in some way more competent or honest in a field of expertise, the unauthorized practice of law statute should not be invoked. This is especially true where invoking the statute will impose greater costs and/or burdens on the citizens of North Carolina. As a matter of policy, the unauthorized practice of law statute should never be applied where such greater burdens and costs clearly outweigh the perceived benefits.

Ironically, this is exactly the mistake that would be made if the Committee maintains its current position on nonlawyer activities respecting retirement plans. The Committee's position would require the involvement of a lawyer in the consideration, design, and implementation of every retirement plan adopted in the State of North Carolina. Obviously, this would impose greater costs and burdens on North Carolina businesses and would very likely lead to fewer North Carolina employees being covered by a workplace retirement plan. The Committee's current position would seem to be based on a view that lawyers are presumptively more qualified than nonlawyers in providing these

retirement plan services. Yet, as noted above there is no objective evidence supporting this perceived higher qualification. In reality, with respect to certain retirement plan services the weight of evidence is clearly to the contrary.

As discussed previously, the Committee's proposed restriction on nonlawyer activities respecting retirement plans would prohibit virtually all consulting services related to the adoption of a plan. For example, the Committee's current position would appear to prohibit an enrolled actuary, without lawyer involvement, from discussing with a North Carolina business the relative funding obligations of different types of defined benefit plans the business is considering. The Committee certainly cannot be suggesting that a lawyer is more qualified to make and present such calculations to the client than an enrolled actuary. In fact, the conduct of these activities by a lawyer without appropriate training could arguably constitute the malpractice of law. Thus, in this case the Committee's current position would clearly impose greater costs and burdens on North Carolina businesses and citizens without any real benefit.

The public will clearly be disserved if the Committee's current position on nonlawyer activities respecting retirement plans is allowed to stand. Greater costs and burdens will be imposed on the businesses and citizens of North Carolina without any real and consistent benefit. There is no clear evidence that lawyers are generally more qualified than nonlawyers in all aspects of the retirement plan field, as the Committee's position would suggest. Without any clear and convincing evidence to the contrary, the paramount public policy interest in promoting workplace retirement plan coverage, particularly amongst small businesses, requires that the Committee's position be withdrawn.

E. Conclusion

For the foregoing reasons, the Committee should entirely withdraw its current position respecting nonlawyer retirement plan services since such position is inconsistent with North Carolina law, in conflict with well-settled Federal law, and contrary to the public interest of the citizens of North Carolina.