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Definition of Employer Under Section 3(5) of ERISA-Association Health Plans

Comment On: EBSA-2018-0001-0001
Definition of Employer Under Section 3(5) of ERISA-Association Health Plans

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General Comment

Please accept these comments early for the March 6, 2018 deadline. Thank you.

Attachments

Comments DOL ERISA Feb 13FINAL



Comments on Small Business Impediments and Regulatory Recommendations under Title I of Employee Retirement Income Security Act (ERISA) Allowing Association Health Plans (AHPs) for Small Businesses

Comments Also Reflect Recommendations Made Under Executive Order 13771 Reducing Regulation and Controlling Regulatory Costs

and

Executive Order 13777 Enforcing the Regulatory Reform Agenda

Submitted to

Employee Branch Security Administration

Department of Labor

Docket Number 2017-28103

RIN-1210-AB85

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Introduction

These comments are filed on behalf of my own small consulting business established in summer 2016. Many hundreds of thousands of other businesses, like mine, who find health care insurance coverage costs the most complicated challenge. The challenge includes both obtaining in excellent coverage and budgeting for escalating costs.

How many small businesses can survive if health insurance costs increase 52% every 19 months?

The comments are not intended to change or weaken the Affordable Care Act (ACA) but to address the flaws in private health insurance for small businesses¹. Additionally, these comments are not intended to critique any specific insurance company or criticize state insurance pools.

My health insurance coverage is excellent but the cost has increased by 52% in 19 months with no cause due to new health events.

My health insurance choices for a PPO² was limited to only five options (three HMOs and two PPOs). My PPO was available in only five zip codes³ in all of Northern Virginia between Richmond, Virginia and the Northern Virginia border with Washington, D. C. and with Maryland. Most Americans would likely be surprised to learn that purchasing private health insurance can be limited to specific zip codes where health insurance providers might cherry pick customers.

I was not surprised that purchasing affordable PPO policy would require a high deductible to reduce monthly premium costs. But I never anticipated a cost of approximately \$40 each month resulting in escalated costs over 19 months.

Health insurance is my company's highest expense. Given the increases in the first 19 months there is little ability to predict health insurance costs for 2019-2025. Predicting one's largest annual expenses is usually considered common sense business planning. My one-person business has health insurance costs is currently almost \$20,000 per year with a \$6000 deductible. It is hard to imagine the cost for a similar small business owner with a spouse and children.

¹ The announcement of direction to Department of Labor to undertake this rulemaking was announced at the time of the President's Executive Order 13813 Promoting Health Care Choice and Competition Across the United States, October 12, 2017 appears to address many other AHA issues. These comments do not intend to address many of those issues. The author is not qualified to address broader AHA policy issues, regulation, or make recommendations.

² In this case because a PPO assured of access to major hospitals across northern Virginia and allows retaining existing physician

³ Information regarding PPO offered for people who live in only five zip codes in northern Virginia provided by insurance broker for small businesses since Jan. 2, 2018.

If past is prologue, my health insurance costs could reach \$30,000 per year within the next 24 months without being triggered by any health care events, hospital admission, or diagnosis of any new illness. At this rate of health insurance cost increases, how long until the health insurance costs exceed \$50,000 per year, slightly lower than the annual U. S. median household income⁴.

At this rate of health insurance cost increases, how long until a solo operator's health insurance costs exceed \$50,000 per year—slightly below the annual U. S. median household income of \$57,230?

These comments reflect my own views, experiences and research on behalf of many small business owners—and do not intend to reflect any views of my energy and manufacturing sector business clients. Nor are they intended to speak to broader Affordable Care Act policy issues.

Executive Summary/Recommendations

- Health insurance costs continue to sky rocket for many small businesses. Many business organizations have filed comments or provided documentation of the problems of entrepreneurs and small business (<50 employees) who face difficulties in attracting and keeping skilled workers without health insurance coverage. These health care cost and access problems have been documented by National Federation of Independent Business, National Association of Self Employed (NASE), U. S. Chamber of Commerce and other organizations. In the case of NASE there are several member company surveys that document the struggles that small businesses have with health care coverage.
- DOL should finalize the rule as expeditiously as possible but ensuring that Association Health Plans (AHP) are solvent, meet requirements of Affordable Care Act (ACA), and that the establishment of AHPs do not create opportunities for sham health insurance.
- AHPs should apply for self-employed, LLC or solo operators not just companies with <50 employees. IRS's website⁵ on LLCs explain that LLC self-employed or their employees are "members". Thus, the final DOL rule should apply to solo operators in LLCs and their employees. Private sector and www.healthcare.gov purchasing systems (electronic or other) should make it clear to consumers if AHPs are available to the purchaser. Large LLCs with thousands of employees should not be covered by AHPs.
- Health Insurance Costs, Access, and Price Escalation Creates Distortions and Classes of Entrepreneurs

My company's small business competitors located in Washington, D. C. belong to the Washington, D. C. health care exchange (or link)⁶ that offers more insurance options at lower costs. Ex. A solo operator owned regulatory consultant in Washington, D. C. with comparable PPO health care insurance to mine have pays \$840.00 per month (with a \$6,000 deductible)—far less expensive than my insurance. Her insurance costs have increased only modestly because the DC Health Insurance Exchange or Link is

⁴ Business Insider, September 12, 2017, www.census.gov based upon Release Number CB17-156, September 12, 2017 that indicates the 2015 median income was \$57,230.00

⁵ Ibid

⁶ Participation is required by D. C. law for small businesses with less than 50 employees.

broader. Another competitor pays \$469.00 per month for a HMO (with a \$6,000 deductible). While it may not be fair to compare my PPO to a competitor's HMO, because the HMO's catastrophic care is not as good as the PPO, it is fair to point out that my health insurance has increased by 52% while both of their policies have only marginally increased over the last two years.

- **Status Quo's Long-term Consequences to Entrepreneurship**

If the Administration does not address the problems faced by small businesses forced to purchase in the private health care market with no ability to buy across state lines or form associations with other similar entities, the nation will see a chill in the creation of new businesses. **Entrepreneurship will be relegated to only those people who can obtain health insurance through spouses, private sector retirement, military, or government retirement health insurance or perhaps delay the establishment of new businesses until the founder can use Medicare health insurance (with supplemental insurance).** None of these results would be healthy for the nation's economy. While perhaps very wealthy could establish new businesses without access to these health insurance programs, it would not be likely that wealthy business owners would establish businesses that employ many people since with each person employed would result in more overhead costs. Given current ERISA rule that excludes cross state purchasing for small businesses, health insurance costs are only be expected to increase.

Surely, we don't want to live in a society where only the wealthier class or those who are old enough to have health insurance from former employers, including U. S. government, can take the risk to start new businesses. Current ERISA limitations on AHPs for companies with <50 employees discourage younger people, singles with no spouse providing health insurance, child-bearing age who seek to have children, or those with chronic illnesses who would be foolish to start a new business with unpredictable health insurance costs.

Background

Affordable and reliable health insurance is one of the top three problems for new and existing small businesses according to NASE's 2015 and 2016 surveys⁷. It is certainly one of the most significant problems for the self-employed because the costs are both unpredictable and often are the largest cost for a new small business with one or perhaps a few dozen employees. Congress and the regulatory agencies (and tax policy) have incentivized solutions for the impoverished, the elderly, and those small business owners making <\$48,000⁸ a year through subsidized health insurance.

Unfortunately, no one seems to have focused on the fact that self-employed, LLCs, solo operators, and businesses with less than 50 people have been treated under tax law policies that forbid purchasing health insurance across state lines or with associated parties (geographically or similarly suited businesses-i.e. local business organizations, employer groups, economic development organizations, called "Associations"). **The Administration is to be commended for taking actions to rectify this**

⁷ www.NASE.org

⁸ Formula for subsidy based upon poverty level according to www.healthcare.gov

problem that goes back to the 1970s. According to U. S. Department of Labor small businesses represent 28.5 million businesses. Approximately 18,000 businesses have fewer than 500 employees. Approximately 22 million small businesses are self-employed. **According to SBA's statistics, these new small businesses added 1.4 million new jobs in the last reported year and 30% of those had fewer than 50 employees**⁹. Sixty percent of all new jobs between 2009 and 2013 were created by small businesses.

Cost-Benefit Analysis for Review of Existing ERISA Regulatory Limitations for Small Business

Wells Fargo, NASE, and other organizations¹⁰ have membership surveys indicating that many self-employed businesses have difficulty obtaining or affording health insurance. Many small businesses with <50 employees do not offer health insurance due to soaring costs, administrative concerns, or simply no understanding how to purchase health care coverage. I defer to many of these organizations who may offer more substantive cost savings estimates.

I do not have the skills necessary to predict granular details on cost savings if AHPs are allowed. According to DOL and SBA's statistics, this rulemaking might benefit as many as **22 million people**. If this rulemaking saved each business owner only \$1,000 a year or \$83 dollars per monthly health care payment, this would be a general savings of \$22 billion. Perhaps more importantly, the DOL action could signal that AHPs provide a sensible way for new businesses to offer health insurance for employees.

If the DOL regulation only saves 22 million business owners or their employees only \$1,000 per year or \$83 per month, this would be a general savings of \$22 billion in health insurance costs.... A rule establishing AHPs would also signal to those considering a new business that escalating health insurance costs won't threaten a family's financial stability.

Although my firm is not an expert on correlation between health insurance and preventative health care, it seems common sense that most people who have health insurance have better health overall because they are eligible to have routine medical appointments and take advantage of preventative care. Many people with no health insurance (or only catastrophic insurance) rely upon public health clinics, hospital emergency rooms, or "doc in the box" local urgent care facilities on a cash basis. DOL and OMB should estimate the savings to our society if AHPs expand health care for those who are not insured or are underinsured now.

More small businesses might expand and hire more skilled workers if health insurance is offered. Further, the DOL rulemaking offers an opportunity to meet the President's Executive Orders¹¹ call for regulatory reform to decrease costs. DOL's cost estimate for health insurance cost reductions should be consider a regulatory savings under the Executive Order, OMB's February memo, and DOL's instructions for regulatory reform cost calculations.

AHP Participation and Purchasing Opportunities

⁹ U. S. Small Business Administration, www.sba.gov

¹⁰ USA Today <https://www.usatoday.com/story/money/columnist/abrams/2017/07/19/big-problems-small-business-health-care/457952001/>

¹¹ Executive Order 13771

Access to participation in AHPs should be allowed at any time of the year. Participation (or changes in participation) should be like auto, home, flood insurance, life, or boat insurance and not have enrollment season open only in November or during major life transition such as divorce, marriage, adoption or loss of job. *(The proposed rule did not appear to suggest limited enrollment or purchase time but it seems appropriate to differentiate it from AHA's time limitation for joining AHA program during open enrollment).*

Past AHP Failures Can Be Avoided Through Reasonable Regulation

DOL's proposed rule acknowledges that there were health care associations in the past (many prior to the change in 1970s ERISA law) that failed. In some instances, those insurance providers did not have sufficient financial assets and in other instances it was not clear that those business enterprises ever intended to provide sufficient cover health care costs of insurance customers. Any final rule should allow state insurance boards or public utility commissions to set solvency requirements and ensure consumer protections to avoid insolvency. A well thought out DOL rule can avoid a repeat of the past problems.

Further, the insurance policies offered under AHPs should meet all the basic coverage and mandates of the Affordable Care Act (ACA) including coverage of pre-existing conditions. The purpose of the DOL rule should not to create new versions of inadequate health insurance or sham insurance policies but to widen consumer protections.

The goal is to expand the pools and provide health insurance through a wide offering of options from business entities, state business organizations such as national, state or local community Chambers of Commerce, manufacturing, allied economic development, or allied business organizations. Organizations that provide continued training or set professional licensing standards might be able to offer AHPs to benefit their members (and perhaps non-members at an increased price).

Evolution of Small Businesses Offers More Stable Participation for AHPs

Forty years ago, the U. S. economy was largely supported by large businesses. There are many reasons why small businesses emerged in the last thirty or forty years including access to capital, lowered interest rates, better education, technology breakthroughs, changes in bankruptcy laws, women, veteran or minority owned businesses, etc. If DOL's rule allows expansion of AHPs there will be far wider participation than forty years ago. Today, 54% of small businesses are operated from home and are likely optimal for purchasing AHP health insurance. Today, the U. S. population has more small businesses owned by individuals who also raise families and could employ others. This change to a larger percentage of small business entities should motivate more insurance companies to enter the AHP marketplace with large associations.

Other businesses might also want to offer such insurance policies to self-employed businesses that have a high percentage of self-employed, LLCs, or sole practitioners, such as (but not limited to) accountants, graphic designers, real estate brokers, website designers, home school operators, business consultants, public and private school teachers who might want summer-time small businesses, beauticians, barbers, shoe repair, dry cleaners, small retail, construction businesses, architects, or wholesale merchants, and others. Thirty years ago, many of these business enterprises were parts of larger businesses.

Examples of Possible AHP Purchasers

Some fire, police or other municipal government functions offer health insurance for early retirees the health insurance only covers the employee or his/her family. Perhaps some retirees in their late-50s might want to purchase AHP health insurance after they retire from those municipal careers to pursue new business opportunities. For example, a 54-year old retired EMT employee working with a local fire fighter team may no longer be able to handle the physical demands of lifting or carrying but might be an excellent owner/operator of a health care business assigning employees as nursing assistants to the elderly or those needing temporary at home care following surgery. That EMT worker might have COBRA or retirement health care for some limited length of time or until Social Security and Medicare eligibility kicks in. Few retired EMT or nurses could open a small business providing home health care coverage if they had to pay as much as \$20,000 in health care costs only for themselves and perhaps another \$5,000- \$10,000 per employee in the first two years even if their employees had to pay for part of their own health insurance. Nor would that small business likely obtain top quality talent without offering health insurance. A sixty-year-old retired school teacher (not yet Medicare eligible) may want to purchase AHP to provide for her own two employees for a start-up day care program or educational tutoring program. While that retired teacher may have eligibility for Medicare in the future—his/her employees would not.

Younger IT professionals or “Ap” designers or game designers in businesses that may not have even existed ten years ago should not be discriminated against joining the self-employed or small business entrepreneurial class because of no access to retirement health insurance. While inadvertent, the current policy preventing small entrepreneurs from purchasing health insurance across state lines discriminates against many younger people who would otherwise like to start a business. Those younger people of child-bearing age, regardless of sex, are even more disadvantaged from risking a startup with no health insurance.

DOL’s goal should be for private business owners (including solo operators or LLCs) and their employees to have multiple private sector options to purchase health insurance through solvent, legitimate businesses or health insurance associations (AHPs). These new AHP providers (or brokers) should be financially solvent and be able to offer insurance to those individuals that have similar business interests or are in geographic areas of common (such as type of business). AHPs should not be restricted to intrastate customers because that geographic restriction would hurt small population states such as Vermont, Rhode Island, and Alaska, or those states that have aging populations such as Florida, Iowa, Pennsylvania, West Virginia¹². U. S. health insurance through AHPs should not discourage entrepreneurship in the states with smaller populations or aging populations by narrowing their options.

Not all Business Associations or “Associations” Are the Same

These comments are not intended to restrict entry into the insurance brokerage business or to see a rule that only benefits existing trade or professional “associations”. But the DOL rule should recognize that there should be no restriction that a person or small business could only buy from an association that it had a membership affiliation in before the DOL rule is final. It appears wise to require some

¹² U. S. Census Bureau, Demographic Profiles, Census 2000, assessed at www.census.gov/Press-release/www/2001/demographicprofile.htm; September 19, 2011.

relevancy or connection between the association and the ultimate customer (whether a solo operator, LLC, or small business with 49 employees).

“Associations” that want to engage in AHP brokerages or business offerings, whether for profit or nonprofit must meet some “smell test” that they are legitimate enterprises. As pointed out by other parties who have filed comments, state laws have dealt with similar requirements to protect the consumer—but not to overly restrict entry into business by new parties. Perhaps the AHP providers/brokerage firms should meet requirements proving that they have been in good standing under state laws and have filed normal IRS filings for a minimum of two years, in order to engage in AHP businesses, broker or provide AHP to their “members”.

Similarly, solo operators or LLCs may need to provide some documentation such as the EIN number, LLC paperwork, confirmation of recent quarterly or annual tax filing confirmation, to show that it is indeed a real business and eligible for AHP insurance.

Creativity for AHP Eligibility Should Be Encouraged

These comments defer to DOL to look at other ways to expand “pools” but providing that there are consumer and health insurance protections. I am aware that some small companies affiliate with other small businesses to reduce some IT functions, recruiting, training, or manage payrolls, accounts receivable and accounts payable functions through Profession Employer Organizations (PEOs). Perhaps those PEOs should be allowed to offer AHPs to their current customers if they have other business affiliations. Not all solo operator or LLCs are big enough to use or afford PEOs so AHPs participation or offerings should not be restricted to PEOs. Creativity in allowing AHPs to form should not bypass good governance or create loopholes.

All AHP providers should meet state financial solvency requirements.

AHPs Should Not Make Health Insurance Costs More Expensive or Restrict Size or Quality of a Pool

Appropriate state/Federal consumer protections should exist to make certain that the health insurance providers don’t use AHPs as another way to limit insurance coverage to “cherry pick” zip codes, age groups, or health history. The AHP system should not discriminate against pre-existing conditions. Expanding the pool broadly through AHPs should help the insurance industry that fears having only the sick or higher risk customers. State consumer protection rules and regulations on costs may need to be retained if Federal laws cannot prevent increases in costs or monitor for manipulation.

Let Legitimate Nonprofits Provide AHP

The proposed rule appears to encourage AHPs by similarly situated or broad classifications of businesses. DOL’s rule should allow national, state or local nonprofit organizations to offer AHPs to their “members”. Solvency and consumer protection requirements in those individual states where the business is located must be met.

Existing insurance exchanges or AHPs are rare because of the ERISA language. Based upon anecdotal information it appears there may be perhaps a dozen exchanges or pools today. Perhaps a few are appropriate to grandfather into AHPs. Those AHP or AHP equivalents should be grandfathered if they meet state financial solvency requirements. Anecdotally I have read about Associated Washington

Business (AWB) offers a high-quality program for companies with employers or employees in Washington state. Perhaps DOL should consider grandfathering that program.

State Regulations and Federal Regulations

DOL should be sensitive to the burdens and problems if AHPs must meet duplicative, confusing or different insurance regulatory programs in 50 states (and territories). However, AHPs should not be used to strip important state consumer protections ensuring that insurance policy holders know that they can visit major hospitals in their area without fear that they have purchased a subpar insurance policy.

At a Minimum U. S. Government's Website www.healthcare.gov Should Inform Consumers if AHPs are Available

The website for purchasing private health insurance or for purchasing subsidized health insurance should clearly inform the consumer if there are AHPs options available. These comments defer to the website designers to allow "drop down" boxes or other clear and simple systems to ensure that the consumer knows all available options.

DOL and Health and Human Services Should Consider Availability of ACA Subsidies During First Two or Three Years of New Business

Perhaps new small businesses that have met all the state and IRS requirements demonstrating that the business is legitimate (i.e. filing of LLC or other documentation with state and payment of quarterly self-employed taxes etc., should be eligible for ACA subsidized health insurance during the first two or three years of business or until AHPs are available. This might require Congress to consider and address through Regular Order with hearings, markup, and debate). Admittedly, this expanding who is eligible for the subsidy system might be harder to administer to ensure that the participants are not fraudulent businesses seeking to obtain subsidized health insurance purchased via www.healthcare.gov But perhaps there should be a consideration that small businesses be eligible only during the first two of three years of operation or before AHPs are offered to the majority of small business classifications. One might presume that it might take six months to a year before AHPs are offered after a DOL rule is promulgated.

Recommendations for DOL Rule Are Not Intended to Apply to Large LLCs Functioning as Corporations

Perhaps there should be eligibility limitations on employee size of companies or gross annual income. There are large companies such as Amazon, Chrysler, Kaiser Permanente, Bechtel, GMAC, PriceWaterhouseCoopers, Cargill, Mars, Publix, U. S. Foodservice, Toys R Us, Aramark, that are LLCs with between 5,000 and 150,000 employees. The comments in supports of AHPs are not intended to apply to large companies' health insurance but instead to help small business entrepreneurs on a limited basis.

Making Sure Consumer Know Their Options

The U. S. www.healthcare.gov drop down box might be tied to EIN, SSN, or other identifiers for small business skilled service providers such as (but not limited to) plumbers, electricians, health care workers, consultants, tax preparers/accountants/CPAs/bookkeepers, shop owners, physicians, medical personnel in businesses not providing health insurance, home repair businesses, website merchants, brick and

mortar merchants, restaurant employees, landscaping services, contract office or house cleaners, etc. This proof of qualification for purchaser might require the prospective AHP insurance purchaser to provide NAICS code, LLC name, or the EIN or SSN number to allow the display of qualifying AHPs. The goal is to expand the pool of eligible to buy insurance through AHPs. The more AHP options the merrier.

Educational Conference Calls, Videos or Webinars Need to Better Explain Options

DOL or HHS should provide clear and comprehensive educational materials on AHPs and existing Small Business Health Options Program (SHOP) options. The 90-day maximum waiting period for SHOP may need to be adjusted for those that have used private health care coverage during their first three months of startup. The existing 90-day waiting period cap may inadvertently hurt entrepreneurs.

Conversely, my experience with the Virginia exchange was clear and fast. In the end, I learned that my PPO private insurance was \$221.00 less than what was offered through the (non-subsidized) private insurance exchange.

My fear is that some small businesses or individuals seeking insurance now would falsely assume that their state exchange is the best way to buy health insurance. They might pay the extra \$2652.00 per year thinking “if it is offered through the Virginia Exchange it must be cheaper than calling the insurance company directly”.

Prevent the Law of Unintended Consequences Under Current Health Insurance Distortions

At this rate, it is conceivable that individuals seeking to become self-employed will buy homes in certain zip codes avoiding purchase of homes in other zip codes. Could this create distortions in real estate values over time? This is not unthinkable given that school system ratings affect real estate value.

Further complicating the issue is that my (much appreciated) private health insurance (PPO) is not offered in most of the zip codes for neighboring Arlington County, Clarke, Culpepper, Fairfax, Fauquier, Frederick, King George, Loudon, Prince William, and the Cities of Alexandria, Falls Church and Manassas¹³. So, while my consultant competitors in Washington, D. C. have more health care options at lower rates, my competitors in the surrounding

counties above might not be able to obtain my PPO health insurance *may think that I have an advantage over them.*

Could this strange eligibility system make some residential real estate more valuable than others because of zip codes offering preferable health care or better prices given how many new small businesses are home based?

Relevance to U. S. Bureau of Census Questions for Business

To the extent possible, DOL and U. S. Bureau of Census should work together to ask minimum number of questions useful for DOL and HHS or other agencies to make AHPs work well. The Census asks questions of businesses as allowed by U. S. OMB’s Burden Box review. The questions may need a sunset limitation so that they do not remain asked beyond their purpose. My firm respects that OMB places limitations on surveys to reduce time and costs of businesses asked to provide the government information. My firm filed comments on Feb. 12, 2018 on that request for comment addressing what Census Bureau

¹³ Based upon discussion with a health care broker within the last sixty days.

questions should ask. The comments suggested a few questions that might help DOL maintain certainty that the small business community is fully using AHPs and that AHP knowledge is available. Those comments are found at www.regulations.gov for Docket Number US BC-2017-0005. The questions are suggested to be used for a limited time and not a permanent addition to Census Bureau questions for business.

Conclusion

Department of Labor is to be commended for attempting to rectify a cross state health insurance access problem that was created under ERISA. Perhaps the restriction was designed protect small businesses from insolvency or other problems some 30 or 40 years ago. Times have changed since the 1970s with far more small businesses in need for affordable health insurance. Entrepreneurship should be encouraged by making certain that entrepreneurs can purchase health insurance for themselves and their employees and have some reasonable prediction of costs. Buying across state lines and expanding the pool will only help. The current system allows for neither fair access or predictable costs. The current system for health insurance penalizes younger individuals from becoming entrepreneurs. The current system also discourages unmarried entrepreneurs who do not have access to health insurance through spouses and for individuals not able to use their retirement health insurance, government retirement plans, or military health insurance. Entrepreneurship should be encouraged for all ages and all types of business.

Past insolvency problems can be worked around with a sensible and reasonable regulation to encourage AHPs. This is a regulation that could save several millions of small business entrepreneurs many thousands of dollars a year. A well written rule could also expand pools thus avoiding the complaints by health insurance companies that finding the small business market less desirable.

Most importantly, a nation with more people being insured should improve overall national public health and increase productivity. A final rule issued before the next publication of the Unified Agenda of Federal Regulatory and Deregulatory Actions would be optimal because the revised rule should demonstrate saving regulatory burdens.

Thank you for reading the comments.

Submitted by

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