BOSE
McKINNEY
& EVANS LLP

ATTORNEYS AT LAW

W. James Hamilton
Direct Dial: (317) 684-5419
Fax: (317) 223-0419
E-Mail: JHamilton@boselaw.com

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Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: Definition of Employer – Small Business Health Plans RIN 1210-AB95

Dear Sir or Madam:

Bose McKinney & Evans LLP is privileged to serve as legal counsel for several multiple employer welfare arrangements (MEWAs). The firm appreciates the opportunity to comment on one specific portion of the proposed rule.

The preamble indicates that the proposed rule is not intended to restrict the offering of non-plan MEWAs.[i] Rather, the proposed rule is designed to expand opportunities for association health plans (AHPs), which are plan MEWAs. It appears that, after the rule is finalized, the only way to achieve plan MEWA status will be in accordance with the requirements for a bona fide group or association of employers.

Many of the bona fide requirements are consistent with prior plan MEWA guidance. However, the nondiscrimination provision set forth in Proposed Regulation § 2510.3-5(d)(4) is new. This new requirement will have a significant destabilizing impact on hundreds of existing AHPs throughout the United States.

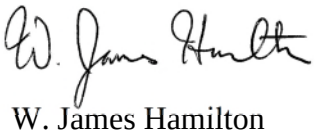
Most existing plan MEWAs operate in accordance with § 2590.702(c).[ii] This regulation indicates that it is permissible for a plan MEWA to develop different premium rates for different employer members based on health claims experience. If, going forward, experience rating is no longer permissible, thousands of employers participating in existing AHPs will see significant premium increases.

The new nondiscrimination requirement will not apply to non-plan MEWAs. Some existing AHPs may decide that non-plan MEWA status is perfectly fine. However, non-plan MEWA status will pose significant challenges for many others. Most existing AHPs utilize a

commingled trust to pay claims. If an AHP is deemed to be a non-plan MEWA, and the AHP uses the assets of one employer plan to pay benefits or expenses of another employer plan, this practice will violate ERISA §§ 403(c)(1) and 404(a)(1).

We believe that existing law already provides robust protections against discrimination. Proposed Regulation § 2510.3-5(d)(4) introduces new concepts that will devastate the existing AHP market. Bose McKinney & Evans LLP respectfully requests that this provision be removed from the final rule. If removal is not practicable, we would politely request that this provision not apply to plan MEWAs where the participating employers maintain a genuine organizational relationship unrelated to the plan.

Sincerely,



W. James Hamilton

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[i] Definition of "Employer" Under Section 3(5) of ERISA – Association Health Plans, 83 Fed. Reg. 614, 616 (proposed January 5, 2018)(to be codified at 29 C.F.R. pt. 2510).
[ii] 29 C.F.R. § 2590.702(c) expressly applies to both group health plans and health insurance issuers. See 29 C.F.R. § 2590.702(c)(1)(i); (c)(2)(ii).