WASHINGTON FARM BUREAU

March 2, 2018

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

Attention: Definition of Employer – Small Business Health Plans, RIN 1210-AB85

Re: Washington Farm Bureau and Washington Farm Bureau Healthcare Trust Comments to Proposed Rule

To Whom It May Concern:

The Washington Farm Bureau and its association sponsored health plan governing body, the Washington Farm Bureau Healthcare Trust, respectfully submit these comments to the U.S. Department of Labor's Proposed Rule entitled "Definition of Employer Under Section 3(5) of ERISA-Association Health Plans." The Proposed Rule concerns when an association is considered an employer under Section 3(5) of the Employee Retirement Income Security Act ("ERISA") for the purpose of sponsoring an association health plan ("AHP").

This letter provides the Washington Farm Bureau and the Washington Farm Bureau Healthcare Trust's background and statement of interest in the Proposed Rule. This letter also provides the Washington Farm Bureau and the Washington Farm Bureau Healthcare Trust's substantive comments and recommended changes to the Proposed Rule.

I. Background to the Washington Farm Bureau, the Washington Farm Bureau Healthcare Trust, and Their Interest in the Proposed Regulations

A. The Washington Farm Bureau

Created in 1920, the Washington Farm Bureau is a membership based organization advocating for the rights of farmers and ranchers in Washington as well as working to help the membership compete in a world of increasing regulatory complexity, legal uncertainty, and a business climate dictated by international markets that set prices for producers. This economic environment requires farmers to constantly seek ways to reduce input costs, which includes health care. We currently have over 47,000 member families.

In the early 2000's, Washington Farm Bureau became extremely concerned over the lack of health care for our members, largely in rural areas of the state. We watched as "health care reform" drove carriers out of the state and challenged rural clinics to stay open. Our members were

confronted with a crisis. Carriers were either, unavailable or unwilling to provide coverage for the less populated areas, and if it was available it was extremely expensive for minimal protection. Additionally, coverage that was offered was often not acceptable to low-volume rural medical facilities, making routine health care challenging, and emergency care all the more risky.

In 2004 WFB sought to remedy this situation by providing a health care solution for our members. We established an association health care program by creating the WFB Healthcare Trust. The operational details of the WFB Healthcare Trust follow in Section I. B.

The goal behind the creation of our own AHP was simple. We would seek to close the rural health care gap by providing affordable health care to WFB members across the state. We would directly market to our membership with our nearly 100-year-old relationship built on trust and service. We did not begin an association for the purpose of providing healthcare. We are a 100-year-old membership organization that saw a need to offer a health care solution to our members who simply could not find coverage in the general marketplace.

We succeeded in providing a product and program that met the needs of many members. At our peak in 2012, we had 917 employers; 7,204 employees; and a total of 12,325 lives covered by our program. Then, legislation (Affordable Care Act) adversely impacted our program and we declined to 127 employers; 1,219 employees; and 1,782 total lives in 2016. Thankfully, we have found ways to continue to grow and serve our members with our health care progam. We currently have 246 employers; 2,740 employees; and 4,313 total lives insured again.

While small from the statewide or national insurance perspective, this coverage has filled critical gaps in coverage for our membership. It also highlights a crucial request. As the rulemaking proceeds to conclusion, please be sure to consider the purpose and value of programs like ours and ensure our continued ability to help farmers and ranchers across the state. Regulations matter. They can truly make the difference between life and death, or financial stability and bankruptcy in this case.

B. The Washington Farm Bureau Healthcare Trust

The Washington Farm Bureau Healthcare Trust was established January 1, 2004 to offer Washington Farm Bureau members fully insured medical, dental, vision and group life insurance benefits. The Trust has served thousands of Washington employers since that time, focusing on employers who are engaged in agricultural-related activities. Since 2015, the Trust's membership has been limited to the employers exclusively engaged in the agriculture industry to ensure compliance with the Affordable Care Act. This Agricultural Nexus is defined by Washington Office of the Insurance Commissioner by a list of 118 NAICS codes. The Washington Farm Bureau Healthcare Trust is considered a bona fide Association Health Plan, sponsored by The Washington Farm Bureau. Its governance and operations meet the applicable federal and state regulatory requirements. The Trust files both a Form 5500 and M-1 as required by federal law.

The WFB Healthcare Trust is managed by a volunteer board of five trustees who are all participants in the WFB Healthcare Trust: Mark Charlton - Trust Chair, Brad Haberman, Steve Cooper, Bill Wirth, and one seat is currently vacant. The WFB Healthcare Trust has no employees and contracts with specific entities to provide healthcare coverage to employers with two or more employees in the Washington Agricultural Nexus. The WFB Healthcare Trust contracts with DiMartino Associates to serve as general agent and to manage a network of over 300 brokerage firms around the state to provide service to the agricultural nexus. The WFB Healthcare Trust contracts with Washington Farm Bureau for consulting and promotional support. The WFB Healthcare Trust contracts with Premera as the carrier for medical coverage:

- Premera Blue Cross offers 52 competitively priced medical plans
- Delta Dental of Washington offers four group dental plans with an orthodontia option and 2 voluntary dental plans
- VSP offers four vision plans
- LifeMap Assurance Company covers all medical plan subscribers for $10,000 of life and accidental death and dismemberment coverage

These offerings provide for a comprehensive employee benefits program tailored to specific employer needs, fully insured by best-in-class carriers, tied together by consolidated billing and free COBRA administration, with local service provided by a statewide network of brokers and consultants.

The WFB Healthcare Trust contracts with Benefit Solutions, Inc. (BSI) for third party administration of paperwork, billing, eligibility, and customer service support.

The Trust is marketed under brand names Washington Farm Bureau Healthcare and WFB Healthcare http://wfbhealthcare.com/.

II. Comments and Recommendations on the Proposed Rule

A. The Rules Should Encourage Innovation in Benefit Offerings and Underwriting.

Washington Farm Bureau and the Washington Farm Bureau Healthcare Trust applaud the Department of Labor's acknowledgment that AHPs offer an important alternative for employers seeking health plan coverage. The AHP market provides many advantages to employers, which are otherwise unavailable in the community rated small group and the experience rated large group market. Some of the most important advantages are: 1) using economies of scale to negotiate better deals for participating employers; 2) providing unique and industry specific plan and product offerings, otherwise not available from the insurer via the traditional small group market; and 3) facilitating benefits administration for participating employers through online eligibility management, consolidated billing, COBRA administration, employer required

communication/notices and access to ancillary benefits (vision, dental, life and accidental death and dismemberment).

The foregoing advantages are present in Washington State because of Washington State's unique AHP market. Specifically, Washington State has had a robust AHP market for many decades. At times the AHP market has been larger than the small group market, but currently they are about the same size (approximately 200,000 participants in each market). The states Blue Cross and Blue Shield license holders (Premera Blue Cross and Regence Blue Shield) have the large majority of both the small group market and AHP market in Washington State. The Washington Farm Bureau Healthcare Trust is currently contracted with Premera to provide health care benefits to its members, but the Trust has also contracted with Regence in the past.

For decades, Washington State has allowed AHP sponsored plans to use employer-specific claims experience as one of several factors in setting renewal pricing without negative consequences to the market.[1] This is most readily evidenced by the approximately equal size of the community rated small group market and the experience rated AHP market. The notion that an AHP market negatively impacts the small group market by stealing good risk from the community market does not bear out when there are multiple carriers offering both community-rated small group products and experience-rated AHP products. Small employers always have access to both types of underwriting. Both markets also provide other advantages and disadvantages. Some of the disadvantages of the community pool is the fear of attracting worse risk population than other carriers, the community tends to have limited product menus, one size fits all pricing, restrictive plan offerings and lack innovation. AHPs provides an alternative to these issues, but the pricing model is different.

To provide a meaningful alternative to the community rated small group market and to achieve the economy of scale, AHPs need access to the flexibility of the large group benefit structure and underwriting requirements. The proposed nondiscrimination rule unfairly disadvantages fully-insured AHPs because it removes the most important tool for providing a meaningful difference in the underwriting available to other small employers. If the rule is adopted in its current form, we expect that insurance carriers will cease to be innovative and flexible in an effort to reduce the risk of negative claims experience.

Additionally, AHPs do not just offer coverage to small employers. A small number of larger employers (with 51+ employees) also join AHPs for various reasons. However, insurance carriers will not agree to forego underwriting for large employers based on claims experience. This means

[1] Whether the Trust could use employer-specific claims experience was litigated before the Washington Office of the Insurance Commissioner in 2015 in a case entitled "In the Matter of Washington Counties Insurance Fund. Docket No. 15-0035." In that case, the administrative law judge found that the HIPAA's nondiscrimination provision only applied to underwriting based on an individual's claims experience and did not prohibit underwriting an employer-based group based on the claims experience of individuals within that group. Specifically, the judge stated that "a participating employer's employees and dependents need not be compared to other participating employers' employees and dependents – each participating employer's employees and dependents constitute a distinct group of 'similarly situated individuals.'"

that insured AHPs will not have access to employers with 51 or more employees. This undermines the economy of scale advantage that the AHP can offer. Also, in the event the regulations allow for claims-specific underwriting of 51+ employers within the association, other employers (those with 50 employees and less) should be able to have access to the same underwriting.

RECOMMENDATION

The rule should eliminate the propose nondiscrimination provision and allow experience based underwriting at the employer level for insured plans. If the nondiscrimination provision is included in the final rule, existing AHPs underwriting methodology should be grandfathered. Alternatively, the nondiscrimination provision should be limited to self-funded AHPs and the rule should leave to the states how fully insured AHPs should be underwritten (provided it is not more restrictive than large group underwriting).

B. The Rules Should Distinguish Between Self-Funded and Fully Insured AHPs.

We recognize, as noted by several other commenters, that the Rules do not distinguish between self-funded AHPs and fully insured AHPs. We think it is important to distinguish between these entities in the final rule.

Self-funded AHPs have historically presented the most significant problems in the market. Indeed, in the Department of Labor's M-1 regulations, the Department noted that the most significant issues with Multiple Employers Welfare Arrangements ("MEWAs") is the risk that they will fail to pay claims. This risk is much more significant for self-funded AHPs and fully insured AHPs which are back by licensed insurance companies, which are subject to significant review and oversight by the state insurance commissioners and the U.S. Department of Health and Human Services ("HHS").

Moreover, the distinction between self-funded and fully insured AHPs is already recognized in ERISA. Specifically, ERISA 514(a) and 514(b)(6)(A)(i) limits that application of state insurance laws to fully insured MEWAs, except those standards requiring the maintenance of specified levels of reserves and specified levels of contributions and provisions to enforce such standards. Licensing requirements, benefit requirements or underwriting requirements are unnecessary because these apply through the insurance company.

Self-funded MEWAs; however, are subject to all state insurance laws. See ERISA 514(b)(6)(A)(ii). Indeed, in Washington State, Washington State Office of the Insurance Commissioner's position is that no new self-funded MEWAs are permitted under state law. This is because it is the position that Revised Code of Washington 48.125.020 limits certificates of authority to self-funded MEWAs, which were in existence as of December 31, 2003. As a result, despite Washington State's robust AHP market, there is only one self-funded AHP in Washington State.

RECOMMENDATION

The rules should acknowledge the important statutory and regulatory requirements that are already in place for fully insured AHPs. Except for the definition of employer and requested clarifications concerning preemption addressed below, all other provisions of the rule should be limited to self-funded AHPs.

C. The Rules Should Clarify that ERISA Preempts State Laws that Limit Fully Insured or Self-Funded AHPs From Operating.

ERISA Section 514 states that ERISA shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. As mentioned previously, state regulation of fully-insured AHPs is saved from preemption to the extent the state is establishing standards requiring the maintenance of specified levels of reserves and specified levels of contributions.

Although ERISA appears to provide some protection to AHPs by limiting a state's ability to directly regulate an AHP, insurance commissioners regulate AHPs indirectly by imposing stricter requirements on insurance plans offering coverage to AHPs than they would imposed on those same insurance carriers offering coverage in the larger or small group markets. Indeed, there is no current guidance that restricts a state from prohibiting an AHP from self-funding, prohibiting an AHP from obtaining a license, imposing additional and often burdensome filing requirements to demonstrate satisfaction of federal law, or restricting underwriting which is otherwise available in the large group market.

RECOMMENDATION

The Rules should clarify that ERISA preempts state laws which impose requirements on insurance carriers offering coverage to AHPs which are more restrictive than the requirements which would apply if the insurance carrier is offering coverage to other employers purchasing insurance coverage in the market. Additionally, to the extent legally permissible, the Rules should clarify that state laws which prohibit AHPs from sponsoring a health plan or from self-funding are preempted.

D. Allow Working Owners to Participate in AHPs.

Farming is commonly a family business, with spouses and children all working to make the farm successful. Commonly these family members are the only employees of the farm. There are many Washington Farm Bureau members who do not currently qualify to be included in the Washington Farm Bureau Healthcare Trust because the employer and the employer's family is self-employed and there are an insufficient number of farm employees (two or more) to satisfy the Trust's requirements for participation. These family farmers and working owners are struggling to find affordable healthcare coverage in a sparse rural healthcare provider market. Under the

proposed Rule, working owners and their families are considered both an employer and an employee for purpose of enrollment in a group health AHP. This "dual treatment" allows working owners and to be an employer and also qualify for the health coverage offered by the AHP. Although the guidance does not require the Trust to offer coverage to working owners, the possibility of providing coverage to working owners would greatly benefit the members of the Washington Farm Bureau.

RECOMMENDATION

The proposed Rule should retain the proposed expansion of AHP availability to self-employed family farmers and working owners.

E. Most Importantly, the Rules Should Protect What Is Already Working.

As mentioned above, the AHP market in Washington State is robust and works well. The reason for this is because the Washington State associations that sponsor health plans have taken the necessary steps to ensure that they have formal governance and operating structures to satisfy the DOL's bona fide standard. Washington Farm Bureau and the Washington Farm Bureau Healthcare Trust are concerned that the proposed regulations may open Washington State's AHP market to health insurers and human resource service companies masquerading as associations for the purpose of selling health insurance.

In this regard, the Washington Farm Bureau and the Washington Farm Bureau Healthcare Trust believe that it is important that AHPs be limited to membership-based organization, which are tax exempt under Internal Revenue Code Section 501(c), and which are formed at least in part for a purpose other than providing health benefits to its members. These requirements would recognize the importance of the AHP and its relationship to its members.

RECOMMENDATION

We recommend that the DOL bona fide test should be modified, not abandoned – AHPs should not be limited to an industry; however, AHPs should be limited to membership-based organizations, which are tax exempt under Internal Revenue Code Section 501(c), and which are not formed solely for the purpose of providing health benefits.

III. Summary of Recommendations

1. The rule should eliminate the proposed nondiscrimination provision and allow experience based underwriting at the employer level for insured plans. If the nondiscrimination provision is included in the final rule, existing AHP underwriting methodology should be grandfathered. Alternatively, the nondiscrimination provision should be limited to self-funded AHPs and the rule should leave to the

states how fully insured AHPs should be underwritten (provided it is not more restrictive than large group underwriting).

2. The rules should acknowledge the important statutory and regulatory requirements that are already in place for fully insured AHPs. Except for the definition of employer and requested clarifications concerning preemption addressed below, all other provisions of the rule should be limited to self-funded AHPs.

3. The Rules should clarify that ERISA preempts state laws which impose requirements on insurance carriers offering coverage to AHPs which are more restrictive than the requirements which would apply if the insurance carrier is offering coverage to other employers purchasing insurance coverage in the market. Additionally, to the extent legally permissible, the Rules should clarify that state laws which prohibit AHPs from sponsoring a health plan or from self-funding are preempted.

4. The proposed Rule should retain the proposed expansion of AHP availability to self-employed family farmers and working owners.

5. We recommend that the DOL bona fide test be modified, not abandoned – AHPs should not be limited to an industry; however, AHPs should be to limited to membership-based organizations, which are tax exempt under Internal Revenue Code Section 501(c), and which are not formed solely for the purpose of providing health benefits.

Very truly yours,

John Stuhlmiller, CEO
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