SMALL BUSINESS
Association of MICHIGAN

February 26, 2018

The Honorable Preston Rutledge
Assistant Secretary of Labor
Employee Benefits Security Office of Regulations and Interpretations
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

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

Dear Secretary Rutledge:

The Small Business Association of Michigan is pleased to provide these comments with respect to the proposed rule issued in the Federal Register on January 5, 2018: "Definition of 'Employer' under Section 3(5) of ERISA—Association Health Plans (AHPs). **RIN 1210-AB85**

The Small Business Association of Michigan (SBAM) was founded in 1969. Today, we have over 26,000 small businesses as members of SBAM. For over 35 years, SBAM has offered a variety of products and services to our members, including a full suite of human resource and employee benefit programs including group health, life and disability insurance. These programs are fully insured and the billing, enrollment, accounts receivable and member service functions are conducted by SBAM. In addition, we provide many ERISA requirements to our members including Summary Plan Descriptions, Notice of the Exchange, COBRA, Section 125, HRA and HSA administration. Today, our group health plan insures over 75,000 lives. SBAM is an association, we offer health plans, but we are not an Association Health Plan based upon the definition included in the proposed regulations.

Overview

Having spent over three decades at the intersection of small employers, group benefits and government relations, we get it. SBAM applauds the Department of Labor's focus on developing tools that can be used to reduce regulatory burdens, lower premiums and increase competition in the health insurance marketplace for small business. The small business community needs substantial relief from health care costs and many of the burdens imposed by the Affordable Care Act.

SBAM believes that the necessary level of cost reduction can only be achieved through a broad reform of the current health care delivery system. The goal must be to reduce the frequency of care delivered and the cost of that care. Additional priorities include access to appropriate care at the appropriate facility at the appropriate time. To get it right, we must focus on individual responsibility and empowerment, creation of the right market-based incentives, and a relentless focus on improving quality while driving out unnecessary, wasteful and harmful care. However, some improvements can undoubtedly be made through administrative action, so the Department is to be commended for exploring potential reforms. If AHPs can deliver on these priorities, we are all in.

Our comments have a dual purpose. We hope our suggestions help ensure that AHPs can meaningfully live up to their goal of providing greater choice and access to smaller companies and their employees by driving down costs and creating more competitive market options. Second, we hope that our comments will help ensure that the thousands of small businesses in Michigan and millions of smaller companies across the country that do not purchase their group health insurance through an AHP will not see their insurance premiums further increase as a result of unintended consequences created by "selection" issues. We fear that multiple sets of underwriting rules will create price disparities based on factors other than the reduction of actual health care costs or administrative functions.

Forming an AHP

Under the proposed rule, employers participating in an AHP must have a "commonality of interest." This requirement can be met if the businesses are either in the same trade or industry, or if they share a geographic region (to include an entire state or metropolitan area), even if they are otherwise in different industries or trades.

An association of member companies must operate the AHP itself, and insurance issuers are explicitly and appropriately prohibited from forming an AHP. This prohibition is due to, assumedly; avoid inherent conflict of interest concerns. However, in the proposed regulations, while insurance issuers are prohibited, health systems are not. We believe the same, or even a higher degree of conflict of interest is present if a health system forms an AHP. Additionally, AHPs can be formed for the sole purpose of selling health coverage. These newly formed AHPs are essentially health insurance companies or CO-OPs. When combined with other provisions of the proposed rule (exemptions from rating rules, coverage requirements, etc.) this change could open the door for the formation of groups based primarily upon attracting the lowest risk population. Such activity would drive up premiums for the rest of the market, potentially making "legitimate" associations uncompetitive, and fail to drive down actual health care costs.

> ***Recommendation***: AHPs formed solely for the purpose of offering health coverage should be prohibited and health systems should be excluded from starting an AHP. Until it can be shown that existing associations, formed for other (legitimate) purposes, are unwilling or unable to form and operate health plans on behalf of their members, only existing associations should be permitted to form an AHP.

Eligibility, Rating, and Risk

SBAM membership is open to any small business headquartered within the state of Michigan with fewer than 500 employees; our health plan is open to members with fewer than 100 employees. The proposed rule requires that any business eligible for association membership is also eligible for AHP participation. We believe this rule requires additional consideration, as there are reasons for the

delineation in our own membership. Further, the proposed rule has relatively strong nondiscrimination provisions that prevent health status or claims experience from being used to restrict membership in the association, limit eligibility for benefits, or set financial contributions and rates. We do not want to see those nondiscrimination rules relaxed in the Final Rules.

While health status cannot be used directly as a form of discrimination amongst members, AHPs would be allowed additional rating tools not currently permitted in the small group market, such as employment classification. Further and distinct from the small group market, the proposal appears to offer no limit in the degree to which age and gender could be used to set rates across companies. Combined with the ability to set their own membership criteria, some associations could use the combination of rating rules, benefit offerings, and membership criteria to create a pool that is very actuarially attractive for some small businesses, as well as the AHP sponsor, to the detriment of other small businesses unable to gain similar access. In Michigan, we have seen the impact of different sets of rules for different insurance carriers; invariably one side wins and one side loses through adverse selection, shadow pricing or many other "creative" pricing mechanisms.

This risk selection scenario would be made more acute by the allowance of "illegitimate" associations (see section above) to form for the sole purpose of providing health coverage. It appears likely to us that such organizations would have many fewer hesitations against using all of these tools to "game" the system for the benefit of a few member companies at the detriment of the larger market. Long-standing associations formed for broader purposes are more likely to consider the interests of their entire membership and business community served.

There is no better medical underwriter than an individual looking for health insurance coverage for him or herself. This is proven, once again, in the individual markets formed by the Affordable Care Act. The potential for negative risk selection, by the inclusion of fictitious individual "working owners" as eligible for AHP participation, is a factor requiring additional consideration. The Final Rules must allow the AHP the ability to ensure that self-employed individuals/working owners are indeed self-employed for reasons other than the ability to purchase health insurance via the AHP.

Further, under the proposed rule, only associations that permit self-employed individuals as members are required to admit them for coverage; conversely associations that do not currently allow "working owners" or newly formed AHPs will use this to their advantage. Across the insurance industry, it is known that individual coverage poses the most difficult risk selection issues. Again, this issue creates a significant distinction between traditional associations and those created simply to sell health insurance coverage. Single-purpose associations would exclude the self-employed from membership if they had reason to believe their risk profile would be negative; conversely, they would welcome them if they believed they could establish rating criteria and benefit coverage options that ensured better than average risks. Multi-purpose associations, on the other hand, are more likely to consider many factors in setting their membership criteria, which could lead to them being selected against in the health insurance marketplace.

Finally, the Final Regulations need to be strengthened with regard to larger businesses joining an AHP. Larger businesses, as defined by the Affordable Care Act as those with 50 or more full time equivalent employees, have many options for coverage that small businesses do not have including level funded plans and various other forms of self-insurance. While there is strength in numbers, AHPs could find themselves selected against by becoming the insurer of "last resort" for larger companies unable to secure non-experience rated fully insured coverage and unwilling to self-insure due to the age of their workforce, negative claim experience or developing medical conditions across their covered population. While it is important that smaller companies that otherwise would participate in the small group market be protected from health underwriting, the market for larger companies is very different.

Recommendation: The rating rules that generally apply in the small group market should also be used in the AHP marketplace. AHPs are being promoted as a tool to help smaller employers, which are expected to form the majority of AHP participation. Creating a degree of rating parity between the AHP and non-AHP markets would help to ensure that competition occurs around the ability to drive down administrative and claims costs and not simply the ability to avoid risk. While SBAM believes that the gender and age ratios should be greater than the current 3:1 standard, it is important that all small business markets share common rules. Without common or at least similar rules, adverse selection will occur.

Recommendation: SBAM generally supports the non-discrimination rules included in the proposal, and believes they should be maintained.

Recommendation: Despite the foregoing, SBAM believes that AHPs should have the ability to underwrite larger firms (otherwise ineligible for the small group market) applying for access to the plan. Such an ability may be vital for some AHPs to maintain viable coverage for their many other members. AHPs should not become the "insurer of last resort" for larger companies who find their self-insurance plans in trouble.

Recommendation: The Department should consider creating more uniform rules and standards for the eligibility of the self-employed. Requiring/allowing AHPs to collect and use greater proof of self-employment and length in business could be an important tool for ensuring market stability, both for the AHP and the individual insurance market. A required "continuous coverage" provision and defined open enrollment period for the self-employed could also help to lower the potential risk selection issue of this market.

Pre-emption for Self-Insured AHPs

The proposed rule wisely avoids preemption of state law regarding self-insured AHPs and Multi-Employer Welfare Arrangements (MEWAs). Over the years, we have seen several MEWAs go "belly-up" and we believe that significant issues, such as insolvency and non-payment of claims, which arose

before state oversight of MEWAs was clearly established, will return if single-purpose self-insured AHPs were allowed to exist. The Department admittedly does not have the resources to provide meaningful oversight of this sector. This leaves the state regulatory bodies with oversight for self-insured MEWAs and provides a level of protection for small employers and their employees that the MEWA will remain viable for years to come.

> ***Recommendation*:** The final rule should move beyond the assumption of the status quo and explicitly state that state authority to regulate in the self-insured AHPs and MEWAs arena remains intact under the rule.

Conclusion

The Small Business Association of Michigan thanks the Department for focusing on the urgent need for cost containment and expanded choice in the markets for small employer health insurance. As you move forward, we hope these comments will help you develop policy that addresses the needs of a broad cross-section of the small business community, whether they are purchasing coverage in the traditional small group market, a newly reformed and created AHP market, existing association plans, or other arrangements.

To maximize this potential, SBAM believes that proposals to create AHPs should focus on their potential to reduce regulatory burdens and increase choice, but avoid creating scenarios where the AHPs are merely given tools to manage (and reduce) their risk. Shifting risk is a zero-sum game where one company wins because another loses. However, lifting unnecessary and burdensome regulations, increasing competition to drive down health care costs and creating greater transparency and access through competition can get everyone pulling in the same direction where the entire small employer market can benefit. As you address these rules, we urge you to do everything you can to avoid creating multiple sets of rules that can be gamed through risk selection.

Thank you.

On behalf of the Small Business Association of Michigan

Scott Lyon
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