MASTER BUILDERS ASSOCIATION
of King and Snohomish Counties

WEB MBAKS.COM | OFFICE 425.451.7920 | FAX 425.646.5985
335 116TH AVENUE SE | BELLEVUE, WASHINGTON 98004

March 5, 2018
ATTN: RIN 1210-AB85

The Honorable R. Alexander Acosta,
Secretary of Labor
c/o Office of Regulations and Interpretations
Employee Benefits Security Administration,
Room N-5655, U.S. Department of Labor,
200 Constitution Avenue NW,
Washington, DC 20210

Dear Mr. Secretary:

The Master Builders' Association of King and Snohomish Counties ("MBA") was founded in 1909 and is one of the nation's oldest and largest local homebuilders association. The association and its members take an active approach and leading role in all facets of home construction and address the many concerns and issues affecting our region's ever-evolving and booming housing industry. The MBA's members are award-winning professionals who are trusted within our communities and continue to drive innovation. The association is involved in community stewardship, program development, education and leading government advocacy efforts on behalf of the building industry and homeowners. Our members are professional homebuilders, architects, remodelers, suppliers, manufacturers and sales and marketing professionals. Most of our members are small businesses, the kinds of businesses that the proposed regulation (Association Health Plans, RIN 1210-AB85 (Jan. 5, 2018, the "Proposed Regulation")) and the President's Executive Order (Executive Order 13765, October 12, 2017) are designed to help.

The MBA provides a variety of valuable services to its members, including helping our members with hiring and training, and advocating for members on legal and regulatory issues and other services. The MBAs two largest programs are the GRIP retrospective rating program, a highly successful Industrial Insurance program and our state Department of Labor and Industries and the MBA Health Insurance Trust, which provides access to affordable health coverage and other benefits, including dental, vision, life and employee assistance benefits. The MBA established the Master Builders Association Health Trust ("Health Trust") for the benefit of its members' employees. Notably, the Health Trust has a 30-year history of financial stability, comprehensive benefits packages and competitive pricing. The Health Trust is operated and administered by an independent board of trustees comprised of representatives of our participating members. For many of our smaller employers (over 90% of our membership in the trust), the health trust is the only comprehensive, affordable option for

providing health coverage to their employees. As a long-time sponsor of a well-managed health trust for our members, we are keenly aware of the benefits of providing health coverage through bona fide industry associations.

We appreciate the Department's efforts to promote the expansion of associations that provide health insurance to members through Association Health Plans (AHPs). Properly managed AHPs that are sponsored by associations with a long-term commitment to their members and their employees currently provide many employees with affordable, comprehensive health coverage, and, provided that adequate safeguards are in place, expanding the number of association plans has the potential to provide these types of benefits to many more Americans. Associations like the MBA are uniquely suited to provide benefits to their members because we understand the unique challenges members of our industry face in our region of the state, including the unique challenges associated with providing affordable, comprehensive health care coverage. Furthermore, as a mature, financially sound organization, we have the necessary experience, infrastructure, staff and resources to fulfill our statutory and regulatory responsibilities.

However, we are also aware of associations that mismanaged their health trusts, have given association health plans a bad reputation, and have caused the Department to view such association health plans with some skepticism. We understand the kinds of problems that can arise when substandard operators with no direct interest in the welfare of their members or their employees are allowed to establish and operate association plans, especially in an environment where there is little or no regulation and where the promise of quick profits attract the attention of inexperienced operators or in the worst cases, operators with dubious intentions. The Washington State Office of the Insurance Commissioner has played an active role in holding state AHPs accountable and eliminating some of the shady operators in this jurisdiction. We believe that promoting an expansion of AHPs should be undertaken with great care and with a strong regulatory scheme to ensure that members' employees do not pay their premiums only to find that the plan is defunct and their claims will not be paid. A Department-issued booklet about MEWAs summarizes the dubious history of AHPs as follows:

In practice, however, a number of MEWAs have been unable to pay claims as a result of insufficient funding and inadequate reserves. Or in the worst situations, they were operated by individuals who drained the MEWAs assets through excessive administrative fees and outright embezzlement[1].

[1] MEWAs – Multiple Employer Welfare Arrangements under the Employee Retirement Income Security Act (ERISA): A Guide to Federal and State Regulation at page 3.

The Department's proposed rules regarding MEWAs[2] cite a history of MEWA fraud and abuse detailed in a Government Accounting Office report issued in 1992. The Department states that despite MEWA reporting rules, "many of the MEWA abuses discussed in that report persist today[3]." The Department also recognized that MEWAs are frequently marketed by unlicensed entities that avoid State insurance reserve, contribution and consumer protection requirements[4].

We offer these comments to the Proposed Rule to ensure that the expansion of AHPs is undertaken in the most thoughtful and strategic way possible with safeguards and proper regulatory oversight. For the reasons set forth in this letter, the MBA opposes the adoption of the definition of "Employer" (as defined in ERISA §3(5)) in the Proposed Regulation in its current form.

SUMMARY

Our comments, which address the proposed commonality of interest standards, nondiscrimination requirements, and the lack of an exemption from the rules for states with robust regulatory schemes, are summarized as follows:

(I) The proposed commonality of interest requirement under the Proposed Regulation conflicts with ERISA's underlying principles and promotes the formation of AHPs by entities that do not have their members' best interests at heart. The proposed commonality of interest provision enables precisely the kinds of operators that spurred Congress to act in 1983 and the Department to cast a skeptical eye toward MEWAs;

(II)The proposed nondiscrimination rules under the Proposed Regulation are either unnecessary or should not be applied to bona fide association AHPs; and

(III) The Proposed Regulations do not address the fact that some states have rigorous regulatory schemes that have been successful in stopping many of the most egregious practices by Multiple Employer Welfare Arrangements ("MEWAs"), have strong consumer protections in place, and have allowed well-run MEWAs to operate.

[2] Fed. Reg. Vol 76, No. 234 at 76223.
[3] Id.
[4] Id.

ANALYSIS

(I) The proposed commonality of interest requirement under the Proposed Regulation conflicts with ERISA's underlying principles and promotes the formation of AHPs by entities that do not have their members' best interests at heart. The proposed commonality of interest provision enables precisely the kinds of operators that spurred Congress to act in 1983 and the Department to cast a skeptical eye toward MEWAs. The proposed relaxation of the standards that determine commonality of interest under the Proposed Regulation include some measures that may help prevent fraudulent activity by a newly formed AHP, however, allowing a broad range of entities to form an AHP without a clear connection to an existing membership association could lead to a recurrence of the abuses of the past. These standards may also have the perverse effect of destabilizing well-managed AHPs. Many existing associations have long-established relationships with their members, are effectively controlled by their members, and offer benefits to their industries and professions beyond health insurance. These types of associations would not risk their reputations, goodwill and their survival, by offering a thinly capitalized or substandard health plan. A newly formed AHP under the Proposed Regulation, particularly one that is formed solely for the purpose of obtaining insurance coverage for its members, would not be as concerned about its reputation and goodwill and might not be as dedicated to ensuring the success of the plan.

One aspect of the Proposed Regulation that is most troubling in this regard is the expansion of the definition of "Employer" under ERISA §3(5) to include a group of businesses that are linked only by their common geography. Permitting AHPs to form based solely on broad geographic commonality is inconsistent with prudent policy and conflicts with the well-established principle under ERISA that the group maintaining an employee welfare benefit plan must be linked to the participating employees or contributing employers by common economic or representational interests unrelated to the provision of benefits. The "employment-based arrangements" contemplated by ERISA's text stems from ERISA's purpose to protect the interests of employees, former employees, and their respective beneficiaries with respect to such plans, including but not limited to fiduciary obligations to act exclusively in the interests of these individuals.[5] The unique relationship between an employee and his or her direct employer protects the employee, who can rely on his or her interests being protected when the employer or its representative provides benefits. AHPs formed by diverse employers in a particular geographic region with no other connection undermines the protective connection ERISA requires between the employer or group of employers with common interests sponsoring an employee welfare benefit plan and such plan's member employees and their families.

[5] ERISA § 2.

The Proposed Regulation attempts to address this concern by imposing organizational controls and governance requirements on newly formed AHPs to ensure that these newly formed AHPs would be "genuine employment-based plans"—akin to the bona fide association plans already in existence—and not commercial enterprises that claim to be AHPs but that are more like traditional insurers selling insurance in the regulated employer marketplace. Although these requirements are helpful, they do not adequately address the concerns, in particular with respect to AHPs that are formed solely to purchase health care coverage. It is not clear how the requirements would ensure that these "sole purpose" AHPs would act in the best interest of their members' employees when the only thing the members have in common is their geographic location, particularly if their members have competing or conflicting interests for their respective workforces and benefit needs. This kind of AHP would operate much like a commercial insurance provider except that it would have no license.

In contrast, a bona fide association plan such as the MBA Trust that qualifies as a single "employer" under section 3(5) of ERISA under current federal and state requirements is established to operate in the best interest of its member employees and their beneficiaries. These kinds of AHP are easily distinguished from an insurance company because the association or group of employers was not established for the sole purpose to fund or purchase group insurance coverage. A bona fide association plan can more effectively provide comprehensive advocacy and support to its membership—such as programs to assist members in hiring, training, and retaining talent; advocacy for legal, regulatory, or policy positions advancing member interests; promotion and advancement of members' strategic and business interests; and provision of comprehensive benefits packages that are not limited to health care coverage and that can be designed to address the membership's unique benefits needs. An AHP that is established out of bona fide common interests separate from a singular desire to fund or purchase group insurance coverage is more likely to be designed and operated in the best interests of its member employees and their families.

In addition, a bona fide association plan is less likely to maintain an AHP susceptible to fraud, mismanagement or insolvency that could harm its members and beneficiaries. Current federal and state requirements for AHPs, including the requirement that the group or association preexist as a bona fide association operating in the interests of its members, were imposed in response to a history of fraud, abuse and insolvency of MEWAs. The relaxed commonality of interest standards under the Proposed Regulation would invite the formation of the kinds of AHPs that are more likely to increase the instances of fraud and abuse.

Because group health coverage is not its sole purpose for operations, a bona fide association plan is inherently less likely to restrict enrollment or benefits to discriminate against a specific individual or self-select its association risk pool. In fact, these types of association plans have a strong

incentive to tailor their eligibility and benefits coverage to their members' needs, not to specific individuals or groups with preferred risk profiles and can more effectively do so when all of its members share bona fide common interests.

In addition, the proposed relaxation of the commonality of interest standards may result in a proliferation of AHPs but could also confuse association members with too many choices, put extreme financial pressure on existing well-managed AHPs, and could ultimately prompt members to decide to join new AHPs whose longevity is questionable at best. Under the Proposed Rules, a small employer in the Seattle area could be solicited by a plethora of associations that cover broadly defined groups or regions, offering plans of wildly divergent quality.

To illustrate, a Seattle small business in the homebuilding profession might be invited to join associations covering employers in the city, the county, the region or the state. The same employer might be solicited by associations whose broadly defined group would include homebuilders and others in similar industries. They might also be solicited by associations representing homebuilders nationally, regionally or in the state. Some of these associations might have been established solely for the purpose of purchasing health insurance for their members, some might be newly established AHPs in response to the relaxation of the commonality of interest standards, and some might be existing associations who have not previously managed health programs for their members. Although more choice might be good for our members, too many choices could confuse association members and some of them may make poor choices with dire consequences for their employees. These employers might be lured to associations that advertise lower rates but may not be in business in the long run. Meanwhile, well-managed existing AHPs might be drive out of business and might not be available to serve members if the new AHPs fail or increase their rates over time.

For these reasons, we believe that it is critical that the Department consider requiring AHPs to disclose information in a specified format so that members can make informed decisions about which association to join and which coverage to elect. At a minimum, this information should include how long the association has been in business, whether it was established solely for the purpose of obtaining health coverage, sufficient financial information to indicate the long-term viability of the program, their governance structure, any partners or affiliates, and the administrative costs and fees associated with the program, including any revenue sharing arrangements.

(II) The proposed nondiscrimination rules under the Proposed Regulation are either unnecessary or should not be applied to bona fide association AHPs.

We believe that the so-called nondiscrimination rules under the Proposed Regulation are primarily designed to address issues that are expected to result from the relaxation of the "commonality of interest" standards under the Proposed Regulation. For the reasons set forth above, we are urging the Department to abandon its proposal to relax the commonality of interest standards, and if the Department agrees, these nondiscrimination rules would be unnecessary. If the commonality of interest standards under the Proposed Regulation are adopted in their current form, the bona fide association plans should be exempt.

Given the concerns discussed below, we respectfully request that the Secretary consider the either eliminating Proposed Regulation section 2510.3–5(d) or provide an exemption from these requirements for bona fide association plans that have been in existence for at least one year before the effective date of such final regulation.

The Proposed Regulation requires an issuer to rate group health plan coverage provided through an AHP based on the overall experience of the entire association and would forbid setting rates for each participating member employer based on data and information specific to that employer's population. Although these provisions might be necessary for newly formed "sole purpose" AHPs, they are not necessary for bona fide association plans. Bona fide association plans have been following the ACA rule – which permits employer-by-employer risk rating -- and have been providing their members with excellent, affordable health coverage.

In addition, we agree with the comments regarding the nondiscrimination provisions of the Proposed Regulation set forth in the comment letter submitted by the Master Builders' Association Health Trust.

(III) The proposed regulations do not recognize that some states have rigorous regulatory schemes that have been successful in stopping many of the most egregious practices by MEWAs, have strong consumer protections in place, and have enabled well-run MEWAs to operate.

We agree with and would like to echo the comments set forth in the letter submitted by the MBA's Health Trust in a separate letter regarding the importance of a deference toward state regulation of AHPs and, consistent with those comments, urge the Department to consider providing an exception for Washington state and other states that have an existing strong regulatory framework for addressing association health plans.

In addition, the Department has requested comments regarding the merits of various approaches to providing an exemption under the Department's authority under ERISA §514(b)(6)(B). We do not believe that the Department should exercise this authority under the statute to undermine the states' abilities to regulate MEWAs or AHPs. Concurrent federal and state regulation

of MEWAs have been successful in preventing many of the abuses that spurred Congress to act in the first place – the dual system works and should be retained for the benefit of the employees who ultimately pay the price when these plans fail. Neither the federal government, nor the state governments, could effectively regulate MEWAs without the other.

Finally, we understand that some commenters have proposed that the Department use its "interpretative power" to determine that for purposes of both ERISA Sections 3(5) and (4), *employer* includes a group or association of employers acting for an employer. The commenters' statements indicate that, as a result, an AHP with an indirect employment connection between the participant and the settlor, such as a Membership AHP, would constitute a single employer plan. We disagree and believe that the Department should not exercise its authority under the statute to further shield AHPs from state regulation, to the extent that the statute would permit the Department to do so.

Thank you for the opportunity to comment.

CONCLUSION

For the reasons set forth above, the MBA respectfully submits that the Department of Labor's Proposed Regulation Section 2510.3-5 be revised and clarified as set forth above.

Respectfully submitted,

Kathleen S. Sims – Executive Director,

Master Builder Association of King and Snohomish Counties