Employee Benefits Task Force

March 6, 2018

The Honorable R. Alexander Acosta
Secretary of the United States Department of Labor
200 Constitution Ave, NW
Washington, DC 20210
Attn: Office of Regulations and Interpretations,
Employee Benefits Security Administration
Room N–5655

Submitted electronically

Re: RIN 1210–AB85 – Definition of "Employer" Under Section 3(5) of ERISA—Association Health Plans

Dear Mr. Secretary:

We participate in an employee benefits task force comprised of various state banking associations that provide health care coverage to participating member banks. The task force members specifically undersigned below submit the following comments and requests in response to the Department of Labor's ("Department's") notice of proposed rulemaking entitled "Definition of 'Employer' Under Section 3(5) of ERISA – Association Health Plans" and published in the Federal Register dated January 5, 2018 ("Proposed Rule"). We appreciate the opportunity to comment on this very significant regulatory action and thank the Department in advance for its consideration of the commentary and requests set forth herein.

This comment letter primarily reflects our collective perspective on how the Proposed Rule, if implemented in final form, would impact our existing *bona fide* association health plans ("AHPs"), and is based on our own cumulative experiences in managing and administering AHPs. An "existing *bona fide* AHP" refers to an arrangement that currently maintains a single multiple employer ERISA plan within the Department's sub-regulatory guidelines.

Because each AHP has its own unique characteristics – based on design, structure, funding, applicable laws, *etc.* – the examples included in these comments are for illustration purposes only and are not intended to represent the specific circumstances of any particular AHP or sponsoring organization participating in this comment submission.

As representatives from 11 different state banking associations, we have a wealth of experience in managing and administering AHPs. Some of our member associations have successfully operated *bona fide* AHPs in compliance with applicable governmental standards for many decades. In fact, we have multiple member associations that have continuously and successfully operated AHPs since at least the 1950s. The AHPs participating in this comment submission alone collectively cover approximately 100,000 lives and receive more than $600 million in annual health premiums. As a result, we have

accumulated expert knowledge and experience into what makes a successful AHP.

Regulation of Existing *Bona Fide* AHPs

As you know, AHPs are complex entities, subject to significant regulation through multiple governmental agencies. For example, an existing *bona fide* AHP MEWA self-funded through a tax-exempt trust within the meaning of Internal Revenue Code ("Code") section 501(c)(9) (a "voluntary employees' beneficiary association" or "VEBA") is directly regulated by:

- The Department as (1) an ERISA plan, (2) a *bona fide* AHP and (3) a MEWA;
- The Internal Revenue Service ("IRS") as (1) a VEBA, (2) an employee welfare benefit fund and (3) a self insured medical plan; and
- State insurance department(s) as a MEWA, depending on the arrangement's location and operations.

Numerous other agencies have regulatory authority over the AHP in this example as well, including CMS, HHS and state departments of revenue and taxation.

As an initial matter, we believe that application of the Proposed Rule to existing *bona fide* AHPs already subject to such immense regulatory oversight will create operational inefficiencies due to conflicting legal and regulatory requirements and require changes of such significance as to jeopardize their on-going viability. Perhaps more importantly, while we support the Department's goal of expanding the availability of group health coverage, we are concerned by the Proposed Rule's lack of distinction between AHPs that exist as traditional ERISA plans – existing *bona fide* AHPs under current ERISA standards – and those arrangements that are more entrepreneurial in nature (*e.g.,* those lacking industry commonality and/or those offered through associations that exist for no reason other than the provision of health insurance).

With respect to existing *bona fide* AHPs, the Proposed Rule's preamble states:

> "AHPs that already meet the Department's current commonality of interest and employer-member control standards will continue to be treated as meeting those requirements under the proposal for purposes of sponsoring a single multiple employer plan under ERISA. However, if the proposal is adopted as a final rule, upon effectiveness of the final rule, such an existing AHP would need to meet all the conditions in the final rule to continue to act as an ERISA section 3(5) employer going forward."[1]

We read this to mean that the requirements and conditions of the Proposed Rule would apply regardless of whether an existing *bona fide* AHP seeks to expand its operations and terms of eligibility pursuant to the Proposed Rule's more relaxed standards. Thus, the requirements and conditions of the Proposed Rule would apply to existing *bona fide* AHPs in the same manner as newly formed AHPs established pursuant to the Proposed Rule.

[1] 83 Fed. Reg. 622 (January 5, 2018).

These are vastly different arrangements, presenting different types of risks and varying degrees of state and federal oversight – in short, we believe that these new arrangements should be governed separately. Therefore, we ask that existing *bona fide* AHPs be exempted from a final rule.

Existing *Bona Fide* AHPs Are Readily Distinguishable From "Commercial Insurance-Type Arrangements" And More Closely Resemble Traditional Single Employer Plans

Throughout the Proposed Rule's preamble, the Department discusses the necessity for new AHP standards in order to distinguish AHPs generally from "commercial insurance-type arrangements." Importantly, existing *bona fide* AHPs operating within current Department standards have already undertaken significant measures to effectively distinguish themselves as legitimate "employer" plans within the meaning of ERISA. In fact, with respect to arrangements that satisfy the Department's current facts and circumstances test for determining *bona fide* status, the Department itself states in the preamble to the Proposed Rule that "when an entity meets each of these requirements, the Department has concluded that it is appropriate to treat the entity as an "employer" within the meaning of section 3(5) of ERISA, rather than merely as a commercial insurance-type arrangement that lacks the requisite connection to the employment relationship."[2] Thus, the Department itself acknowledges that existing *bona fide* AHPs are readily distinguishable from the "commercial insurance-type arrangements" that are a focus of the Proposed Rule.

By way of example, subsection 2510.3–5(d)(4) of the Proposed Rule would apply the HIPAA/ACA nondiscrimination rules at the AHP level, prohibiting an AHP from treating employees attributable to different participating member groups as "distinct groups of similarly situated individuals" for purposes of these rules. While application of the nondiscrimination rules in this manner may be a necessary protection where AHPs are expanded pursuant to the Proposed Rule's new standards, we believe that existing *bona fide* AHPs should be afforded the same application of the HIPAA/ACA nondiscrimination rules as traditional single employer plans under existing law.

In this regard, due to the traditional elements of control and commonality of interest present in an existing *bona fide* AHP, our health plans are structurally, administratively and often demographically similar to that of a single employer plan that covers employees at different geographic locations or multiple employers within a single control group. As we understand it, in many cases a traditional single employer plan treats these distinct employee groups as "similarly situated individuals" for purposes of applying the HIPAA/ACA nondiscrimination rules. We believe that these scenarios are analogous to the circumstances of an existing *bona fide* AHP's structure, purpose and participating employer group composition. Accordingly, we believe that existing *bona fide* AHPs more closely resemble traditional single employer plans than the new type of AHP that would be permitted under the Proposed Rule. Thus, in the event that existing *bona fide* AHPs are not made exempt from a final rule, we ask the Department to allow existing *bona fide* AHPs to treat employee groups attributable to different participating employers as "distinct groups of similarly situated individuals" to the extent permitted by the HIPAA/ACA

[2] 83 Fed. Reg. 617 (January 5, 2018).

nondiscrimination rules.

Moreover, while we understand and appreciate that certain restrictions and protections may be necessary in light of the Proposed Rule's more relaxed standards, we believe that existing *bona fide* AHPs in particular do not require these same restrictions and protections. In this regard, we note that an existing *bona fide* AHP does not operate for profit. We believe that this fact alone serves as a critical factor to distinguish existing *bona fide* AHPs from commercial insurance arrangements. Where profit motive does not exist, many of the concerns identified in and addressed through the Proposed Rule become irrelevant.

Application of Nondiscrimination Rules to AHPs In General; Adverse Selection

In the context of the Proposed Rule's nondiscrimination requirement generally, we also call the Department's attention to the confusion that may be caused by altering the application of significant laws such as the HIPAA/ACA nondiscrimination rules outside of the primary source of those laws. As previously highlighted, AHPs already exist in a complex and challenging compliance environment. We believe that imbedding a special substantive interpretation of the HIPAA/ACA nondiscrimination rules into a definitional provision – in this case, the definition of an "employer" under section 3(5) of ERISA – invites opportunity for inadvertent compliance failure and opportunistic interpretation. Accordingly, while we appreciate the Department's broad rule-making authority, we encourage the Department to consider the potential consequences of executing its authority in this manner.

As a separate but related concern, we would also like to highlight how application of the nondiscrimination requirement at the AHP level can operate to promote adverse selection against the AHP. This is particularly true for self-insured AHPs comprised of both small and large employer groups.

In a single employer setting, most employees participate in the employer's group health plan regardless of premium as most individuals have few other group coverage options. In this situation, the participation of large numbers of healthy employees offsets the risk presented by a smaller group of riskier individuals, thereby spreading risk and creating greater affordability and stability within the plan.

In the AHP setting, however, larger employer groups generally do have group health options other than the AHP. In contrast to the single employer setting, these larger (typically lower risk) employer groups may find better rates through self-insuring on their own or through a stand-alone large group policy. In most cases, these employers will opt for the better rates. Ultimately this leaves behind the smaller or riskier employer groups, creating increased costs and instability within the AHP. This scenario reflects how many participating employers will respond to the "involuntary cross-subsidization across firms"[3] that the Department references in the Proposed Rule's preamble – where incentive and opportunity exist, many employer groups will select against the AHP. Adverse selection is a very real phenomenon which we believe would ultimately lead to the so-called "death spiral" for many AHPs.

[3] 83 Fed. Reg. 624 (January 5, 2018).

The detrimental effects of adverse selection in this context could also have a negative effect on the traditional markets for individual and small group coverage. As employers and self-employed individuals move in and out of the new AHP arrangements, they could disrupt the stability of insurance pools in more traditional arrangements.

Accordingly, we respectfully ask the Department to reevaluate its proposed application of the nondiscrimination rules to not only existing *bona fide* AHPs but also new AHPs under the Proposed Rule. While our preference is that existing *bona fide* AHPs be exempted from a final rule, at a minimum we ask the Department to consider alternative underwriting or participation standards that might more fairly balance the competing interests presented by the Proposed Rule's application of the nondiscrimination rule, particularly with respect to self-insured AHPs. In this context, it is important to keep in mind that there are many benefits that may be realized through participation in a successful AHP beyond strict risk sharing – economies of scale are also found in administrative efficiencies and the transfer of plan maintenance responsibilities from participating employers to the AHP level.

Certain State & Federal Laws Conflict with the Proposed Rule

As the Department has recognized, existing *bona fide* AHP MEWAs may be subject to strict state laws as well as federal laws beyond ERISA. In some cases, compliance with state laws would prohibit a self-insured MEWA from taking advantage of any expansion opportunities presented by the Proposed Rule. As you are aware, many state MEWA statutes prohibit participation by employers across different industries and also prohibit participation by self-employed individuals. Likewise, many state MEWA statutes also forbid the establishment of a MEWA solely for the purpose of obtaining or providing insurance coverage. Finally, certain state MEWA laws, if not preempted by ERISA, would actually preclude compliance with the Proposed Rule.[4] Thus, should a final rule be issued, we request the Department's guidance as to the circumstances in which these types of state MEWA laws would be preempted by ERISA, particularly with respect to components of the Proposed Rule that appear to be permissive and not mandatory (*i.e.,* participation by self-employed individuals). Where ERISA does not preempt these types of state MEWA laws, we believe this makes an even stronger argument for the exemption of existing *bona fide* AHPs from a final rule.

In addition, many of the aforementioned types of state MEWA laws are derived from federal tax law that governs a funding mechanism common to existing *bona fide* AHPs, the tax-exempt VEBA trust. Thus, many of the same types of conflicts noted above with respect to state MEWA laws also exist with respect to the Code's VEBA rules. In this regard, we call the Department's attention to comment letter #284 to the Proposed Rule submitted by the law firm of Davis, Brown, Koehn, Shors & Roberts, P.C. and dated February 26, 2018. This letter

[4] For example, Ohio Revised Code Section 1739.14 requires that each participating member must pay a premium "equal to its share of the arrangement's projected obligation for employee welfare benefit liability, administrative expenses, and other costs incurred by the arrangement as determined by the board of the arrangement or by a third-party administrator and approved by the board of the arrangement."

provides an in-depth technical discussion of the many conflicts that exist between the Code's VEBA rules and various provisions of the Proposed Rule. With respect to the many conflicts outlined in this letter, we respectfully request guidance from the Department regarding its plans for coordination with the IRS. Where such coordination is not immediately anticipated or may not be possible, we believe this makes an even stronger argument for the exemption of existing *bona fide* AHPs from a final rule.

Summary – A Final Rule Should Take Into Account the Unique Status of Existing *Bona Fide* AHPs

In summary, we respectfully request that the Department implement a final rule that fairly distinguishes between existing *bona fide* AHPs operating under current ERISA standards and those that are established pursuant to the Proposed Rule's less restrictive standards. Specifically, we ask that existing *bona fide* AHPs be exempted from a final rule.

We believe that this distinction is necessary in order to balance the unique legal status of existing *bona fide* AHPs against the Department's goal to expand the availability of group insurance through AHPs generally. Without this recognition, we believe that existing *bona fide* AHPs that have successfully operated for many years may experience significant decline or even cease to exist. Accordingly, we ask the Department to consider allowing an existing *bona fide* AHP that does not desire expansion pursuant to the Proposed Rule to continue to operate as a single multiple employer ERISA plan without being subject to the Proposed Rule's new AHP standards. In this regard, we suggest that status as an existing *bona fide* AHP may be established through various mechanisms such as prior years' Form 5500 filings, ERISA plan documentation, VEBA status and/or a "certification" process administered by the Department.

We also request the Department's consideration of its proposed application of the HIPAA/ACA nondiscrimination rules in the AHP setting in relation to the comments set forth above, and in the context of existing *bona fide* AHPs specifically. As we have highlighted, self-insured AHPs in particular need some allowance for attracting a broad spectrum of participating employer groups and effectively managing the diversity of risk across such groups. In the event that existing *bona fide* AHPs are not exempted from a final rule, we request that they be exempted from the Proposed Rule's special application of the HIPAA/ACA nondiscrimination rules.

Finally, we look forward to the Department's additional guidance and clarification on matters of ERISA preemption with respect to conflicting state laws as well as coordination with related federal rules, including the Code's provisions governing VEBAs.

We thank you for the opportunity to comment on these important issues, and we appreciate the Department's consideration of the various comments and requests set forth herein. If you have any questions about this letter or if we can be of any further assistance, please do not hesitate to contact any one of us directly, or you may contact Randie Thompson, Esq. at 303.808.4041 or randie@erisalawpractice.com.

Respectfully submitted,

/s/ Angela O'Reilly
Angela O'Reilly, CEO
Florida Bankers Health Consortium, Inc.

/s/ Chad Ellsworth
Chad Ellsworth, CAO
Iowa Bankers Benefit Plan (IBBP)

/s/ Chris Wehde
Chris Wehde, Vice-President
Iowa Bankers Benefit Plan (IBBP)

/s/ Charles Stones
Charles Stones, President
Kansas Bankers Association

/s/ Matthew Vance
Matthew Vance, CFO
Kentucky Bankers Association

/s/ Kathleen Meehan
Kathleen Meehan, Senior Vice President
Maine Bankers Association Employee
Benefit Plan

/s/ Scott Gorman
Scott Gorman
Director of Administration, GIT
Massachusetts Bankers Association

/s/ Kevin Kiley
Kevin Kiley, Of Counsel
Massachusetts Bankers Association

/s/ John L. Hunt
John L. Hunt, CLU, President
MBA VEBA Insurance Services
Missouri Bankers Association VEBA Trust

/s/ Lauren R. Perry
Lauren R. Perry, Vice President
North Carolina Bankers Association
Health Benefit Trust

/s/ Jeffrey D. Quayle
Jeffrey D. Quayle, Managing Director
Ohio Bankers Benefits Trust

/s/ Mike Feimer
Mike Feimer, President, SDBIS, SDBBP
South Dakota Bankers Benefit Plan Trust

/s/ Laurie Milligan
Laurie Milligan, COO
Virginia Bankers Association Benefits
Corporation