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March 6, 2018

VIA E-MAIL (http://www.regulations.gov)

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: RIN 1210-AB85: Association Health Plans – Comments on Proposed Rule

Dear Sir or Madam:

This firm represents a client that is a voluntary employees' beneficiary association ("VEBA"), within the meaning of Section 501(c)(9) of the Internal Revenue Code of 1986, as amended, (the "Code") and a multiple employer welfare arrangement ("MEWA"), within the meaning of the Employee Retirement Income Security Act of 1974 ("ERISA"). As information, our client sponsors a self-insured medical plan for the benefit of its member institutions.

On behalf of our client, we would like to comment on the proposed regulation under Title I of ERISA that would broaden the criteria under ERISA Section 3(5) for determining when employers may join together in an employer group or association that is treated as the "employer" sponsor of a single multiple-employer "employee welfare benefit plan" and "group health plan" as those terms are defined in Title I of ERISA (the "Proposed Rule"). Specifically, we would like to address how the Proposed Rule will address the ability of our client (and other similar entities) to remain compliant with (1) the VEBA rules; and (2) state MEWA laws when such entities sponsor a self-insured medical plan.

I. VEBA

In general, it is advantageous for an association health plan ("AHP") or a MEWA, such as our client, to fund its self-insured medical plan through a tax-advantaged vehicle, such as a VEBA. This allows the entity to accumulate reserves for years during which claims experience is low and

ensures that such reserves are tax-exempt. Section 1.501(c)(9)-2(a)(1) of the Treasury Regulations imposes both a common bond requirement and a geographic location requirement.

Our client qualifies as a VEBA under Section 1.501(c)(9)-2 of the Treasury Regulations because it is an "employees' association" that provides medical benefits to employees of its participating members / employers that have an "employment-related common bond." Specifically, they have an employment-related common bond because they are all non-profit, non-governmental entities that are engaged in the same line of business—educational services—and they are all located in the same geographic locale.

Our client would like to allow all non-profit, non-governmental entities in its geographic locale to participate in the MEWA and not be restricted to a single line of business (*i.e.*, educational services). While the Proposed Rule allows AHPs to do this, it does not, however, address how it will interact with the VEBA Treasury Regulations. As such, the Proposed Rule does not address how entities, such as our client and other similar AHPs, which would like to expand membership outside of an employment-related common bond, would be able to continue the use of VEBAs as their funding method without potentially running afoul of the VEBA rules.

As such, we hereby request that guidance be issued to address how the Proposed Rule can be utilized while still allowing our client, and other AHPs, to continue their VEBAs and remain in good standing. For example, the Department of Labor (the "DOL") could work with the Treasury Department to issue guidance under Code Section 501(c)(9) and the Treasury Regulations promulgated thereunder. Such guidance could expressly permit AHPs to fund their plans using VEBAs because the AHP itself provides the employment-related common bond for the purposes of Treasury Regulation Section 1.501(c)(9)-2(a)(1), which would cause the AHP to meet the commonality-in-interest requirement.

II. MEWA State Laws

As previously mentioned, our client is also a MEWA under ERISA because the member institutions to which it provides "employee welfare benefits" are not part of the same controlled group of businesses. Since our client provides a self-insured medical plan, it must also comply with the Florida Non-Profit Multiple Employer Welfare Arrangement Act as that is the state in which it currently resides.[1]

To meet the requirements for issuance of a Certificate of Authority and to maintain its MEWA status under Florida law, our client must, among other things, not combine member employers from disparate trades, industries, or professions as defined by the appropriate licensing

[1] Fla. Stat. §§ 624.436-624.446. Under Florida law, a "multiple-employer welfare arrangement" is an employee welfare benefit plan or any other arrangement which is established or maintained for the purpose of offering or providing health insurance benefits or any other benefits described in Section 624.33, Florida Statutes, other than life insurance benefits, to the employees of two or more employers, or to their beneficiaries.

agencies, and must not combine member employers from more than one of the following employer categories:

(a) a trade association that consists of member employers who are in the same trade as recognized by the appropriate licensing agency;

(b) an industry association that consists of member employers who are in the same major group code, as defined by the Standard Industrial Classification Manual issued by the federal Office of Management and Budget, unless restricted by (a) or (c);[2] and

(c) a professional association that consists of member employers who are of the same profession as recognized by the appropriate licensing agency.

As stated above, our client would like to include all non-profit, non-governmental entities in its own state without being restricted to a single line of business (*i.e.*, educational services). The Proposed Rule does not currently address how associations, such as our client, would be able to expand their membership when they operate in a state with MEWA statutes and regulations that do not allow this, such as Florida.

One potential solution could be to characterize an AHP as the "employer" for the purposes of offering the health insurance—rather than characterizing it as a MEWA. We acknowledge that the AHP must still be adequately capitalized and maintain sufficient reserves.[3] As such, we believe that it would make sense to allow the home state of the AHP to continue to regulate the AHP's capitalization and reserve through its office of insurance regulation, as is the current case. However, it is our opinion that this level of single state control would achieve this goal—but, by considering the AHP to be the "employer," the MEWA issues that arise from state control of self-insured MEWAs (*e.g.*, requiring employment related bond, etc.) would be removed.

It appears that in Executive Order 13771, the DOL would have sufficient authority to design and implement a plan that would allow states to continue exercising their traditional consumer-protection roles without unduly affecting self-insured MEWAs. As such, we hereby request that the Proposed Rule be amended to address this issue.

III. Conclusion

The Proposed Rule would allow our client to increase its association health plan's membership in Florida from non-government, non-profit educational employers to non-government,

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[2] Our client satisfies this eligibility requirement by allowing only members of an industry association consisting of member employers who are in major group code 82 ("*Educational Services*").

[3] For example, our client would continue to comply fully with all other components of the MEWA statute and regulations in Florida (*e.g.*, funding and capital requirements, etc.).

non-profit employers in all industries (*i.e.*, not just educational) and it would allow entities similar to our client to increase their own membership. However, the Proposed Rule does not address how it integrates with other federal and state rules and regulations that do not allow this expansion of membership. As such, we hereby request that the Proposed Rule be amended to address the issues discussed herein with regard to (1) the federal VEBA rules and regulations; and (2) MEWA state laws.

We appreciate this opportunity to comment. If you have any questions, or if we can be of any assistance in your consideration of the issues summarized above, please feel free to contact me at (904) 598-6106 or lcarrasco@srglaw.com.

Sincerely,

Lisa Rhein Carrasco

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