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March 6, 2018

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

RE: Definition of "Employer" Under Section 3(5) of ERISA-Association Health Plans, 83 Fed. Reg. 614 (Jan. 5, 2018)
RIN 1210-AB85

Dear Sir or Madam:

The Nebraska Bankers Association Voluntary Employees Beneficiary Association (the "NBA VEBA") submits these comments on the Department of Labor's (the "Department's") proposed regulation addressing the definition of "employer" under Section 3(5) of the Employee Retirement Income Security Act ("ERISA"). 83 Fed. Reg. 614 (Jan. 5, 2018) (the "Proposed Regulation").

The NBA VEBA offers self-insured health coverage along with insured dental, vision, life and disability coverage to eligible members of the Nebraska Bankers Association (the "NBA"). The NBA has served Nebraska banks since 1890, and now represents approximately 177 of the 185 commercial banks in the state, and 8 of Nebraska's 9 savings institutions. The NBA has offered a health plan as a member benefit since 1945.

The NBA established a voluntary employees' beneficiary association under Code Section 501(c)(9) for funding of the benefit plans in 1974 (the "NBA VEBA"), and received a favorable ruling from the Internal Revenue Service that same year. The NBA VEBA provides health coverage to approximately 5,700 participants whose employers are members of the NBA, with approximately $57 million of annual health premiums.

The NBA VEBA is committed to providing a stable source of quality health coverage and other insurance benefits for eligible members and their employees, spouses, and dependents. The NBA VEBA has always paid eligible health plan claims for its members in a timely manner. It presently maintains a reserve of more than 20 percent of one year's health plan premiums in order to ensure the timely payment of claims. The reserve also allows the NBA VEBA to maintain stable premium increases from year to year. For example, for 2018, the NBA VEBA had no rate increase for health insurance premiums over 2017 levels.

The NBA VEBA's experience in sponsoring and administering a successful association health plan provides it unique insight into the tools and features that enable associations to provide a stable, long-term coverage option. To that end, the NBA VEBA offers the following comments on the Proposed Regulation. In brief summary, the NBA VEBA urges the following:

1. The final regulation should provide a grandfathered provision, allowing association health plans in existence as of a specific date to continue in their current form;

2. The final regulation should permit the use of age banding to determine an employer's required premiums or other contributions;

3. The final regulation should permit groups or associations to impose reasonable contractual limitations on membership to promote plan stability;

4. The final regulation should not permit a group or association to condition eligibility for membership or health coverage on the purchase of goods or services from the organization; and

5. To ensure that a group or association acts in the interests of its employer members and those members' employees and dependents, the final regulation should require the employer members of an association to have a genuine organizational relationship unrelated to the provision of benefits.

The NBA VEBA generally supports efforts to expand access to association health plans, and offers the comments in this letter in the interest of ensuring that association health plans remain a stable source of quality coverage.

1. The final regulation should provide a grandfathered provision, allowing association health plans in existence as of a specific date to continue in their current form.

The Proposed Regulation correctly states that its existing sub-regulatory guidance allows for associations or groups of employers to establish and maintain a single group health plan under ERISA. Given the success of association health plans, such as the NBA VEBA's coverage, the NBA VEBA respectfully submits that the stated purpose of the Proposed Regulation – to expand access to affordable health coverage by providing additional opportunities for employer groups or associations to offer health coverage to members' employees – is not significantly furthered by requiring compliance by current employer associations and association health plans with the Proposed Regulation.

Much of the Proposed Regulation does not hinder the continued existence of the NBA VEBA or its plans. In fact, the NBA VEBA qualifies or meets the majority of the requirements specified in Prop. Reg. § 2510.3-5(b). However, the nondiscrimination requirements set out in Prop. Reg. § 2510.3-5(d) may require changes to the current structure of the NBA VEBA's plan and thereby could threaten the association health plan and the coverage it provides. Correspondingly, the Department should include a "grandfathered" provision for existing association health plans.

As set out in comment 2 of this letter, NBA VEBA suggests revisions to these nondiscrimination provisions to restrict the potential for unintended and negative consequences to current association health plans as well as proposed or developing association health plans. However, to protect the viability of

current, successful association health plans and to prevent significant disruption in the small group market, the NBA VEBA strongly advocates for inclusion of a "grandfathered" provision for association health plans that are in existence as of the publication of the Proposed Regulation.

If the Department would choose not to include a "grandfathered" provision in the final rule and, thus, require existing association health plans to comply with the final rule, the NBA VEBA requests that the Department provide for an appropriate transition period and effective date for existing association health plans to comply with the final rule.

2. The final regulation should permit the use of age bands to determine member premiums or contributions, in order to promote risk pool stability.

The preamble to the Proposed Regulation correctly identifies stability of an association health plan's risk pool as an important concern. 83 Fed. Reg. at 623. However, the NBA VEBA is concerned that the Proposed Regulation could be read to prohibit the use of age bands to determine premiums or other contributions by employer members. This would deprive association health plans of a tool vital to risk pool stability. Association health plans use age-banded rating systems to remain an attractive option to employers with younger workforces, who might otherwise be able to obtain more favorable premiums elsewhere. The Affordable Care Act uses the same mechanism in the small group and individual markets. 42 U.S.C. § 300gg.

The Proposed Regulation requires an association health plan to comply with Department of Labor ("DOL") Regulation Section 2590.702(c) with respect to nondiscrimination in premiums or contributions required by any participant or beneficiary for coverage under the plan. Prop. Reg. § 2510.3-5(d)(3). It further provides that a group or association may not treat different employer members of the group or association as distinct groups of similarly-situated individuals. Prop. Reg. § 2510.3-5(d)(4).

DOL Regulation Section 2590.702(c), the cross-referenced provision, generally prohibits group health plans and health insurance issuers from requiring an *individual* to pay a premium greater than the premium or contribution for a similarly situated individual based on any health factor. A "health factor" means health status, medical condition, claims experience, receipt of health care, medical history, genetic information, evidence of insurability, or disability. DOL Reg. § 2590.702(b)(1)(ii). Although the list of health factors does not expressly include age, other portions of the regulation suggest bona fide-employment based classifications (for example, full-time or part-time status) constitute the only permissible basis for distinguishing between employees. DOL Reg. § 2590.702(d)(1). With respect to beneficiaries, the regulation lists age as a permissible basis for distinction only with respect to a participant's children. DOL Reg. § 2590.702(d)(2)(i)

The NBA VEBA is concerned that the prohibition on treating employer members as a distinct group of similarly-situated individuals in the Proposed Regulation together with the cross-reference to DOL Regulation Section 2590.702(c), will be interpreted to prevent an association from determining an employer member's required contribution using age bands.

So long as a group or association health plan applies age banding uniformly among its employer members, and discloses the fact that it does so, the NBA VEBA respectfully submits that employer members are in the best position to determine whether the practice serves their interests. In addition, the risk pool stability promoted by age banding outweighs the risk that age banding would be used as a pretext for discrimination based on health status. In this regard, the NBA VEBA notes that the cross-referenced

HIPAA regulations prohibit using health factors to determine an *individual's* required premiums or contributions. However, a plan or issuer can take health status factors into account, for purposes of determining the amount the *employer* must pay. DOL Reg. § 2590.702(c)(2)(i). Thus, as drafted, the Proposed Regulation could be construed to prohibit the employer-by-employer assessments that HIPAA *expressly* allows. Consistent with existing HIPAA regulations, the NBA VEBA respectfully submits that, when uniformly applied to determine employer contributions, age banding is unlikely to serve as a pretext for discrimination against individuals based on health status.

To encourage the formation and use of association health plans and to promote stability within an association plan risk pool, associations must have some flexibility in ensuring that the cost associated with the coverage remains competitive. Correspondingly, the Proposed Regulation should clarify that using age bands, which are disclosed in writing, to determine an employer member's required premiums does not constitute a prohibited employer member distinction under Proposed Regulation Section 2510.3-5(d)(4). The NBA VEBA suggests the revision italicized below:

> (4) In applying the nondiscrimination provisions of paragraphs (d)(2) and (3) of this section, the group or association may not treat different employer members of a group or association as distinct groups of similarly-situated individuals; *provided that a group or association may determine an employer member's total required premium or contribution by reference to a uniformly applied written schedule setting forth contributions based on two or more age bands, which written schedule is disclosed to employer members in advance.*

3. The final regulations should permit an association health plan to use reasonable contractual and/or eligibility limitations to promote stability.

The preamble to the Proposed Regulation correctly identifies association health plan stability as an important concern. However, the preamble's discussion could be read to prohibit certain contractual and/or eligibility limitations that associations commonly use to ensure stability. For the reasons that follow, the Department should ensure that the final regulation permits association health plans to impose reasonable contractual and/or eligibility limitations on terminating and resuming coverage.

The Proposed Regulation prohibits a group or association from conditioning employer membership based on any health factor of an employee or employees, former employee or former employees, or their respective family members or other beneficiaries. Prop. Reg. § 2510.3-5(d)(3). In addition, the preamble contains the following statement:

> Coupled with the control requirement, also requiring AHPs to accept all employers who fit their geographic, industry, or any other non-health-based selection criteria that each AHP chooses, the nondiscrimination provisions ensure a level of cohesion and commonality among entities acting on behalf of common law employers . . .

83 Fed. Reg. at 624 (col. 3). The quoted statement could be read to mean that, in addition to nondiscrimination based on health factors, a group or association could not impose reasonable contractual and/or eligibility limitations on membership (and thus, eligibility for coverage) for employer members who drop and resume coverage. This seems at odds with the HIPAA regulation cross-referenced in Proposed Regulation Section 2510.3-5(d), which provides that the election of prior coverage is not, itself, within the scope of any health factor. DOL Reg. § 2590.702(a)(3).

The NBA VEBA imposes contractual and eligibility limitations on a member's ability to discontinue and resume coverage in order incentivize long-term membership. This in turn promotes a stable risk pool. As an example, the NBA VEBA imposes a waiting period of two years, during which a member who drops association coverage cannot resume coverage under the association plan. The NBA VEBA also a right to impose a termination fee on members who leave the plan, determined as a reasonable percentage of the terminating member's premiums.

These contractual and/or eligibility tools address a market reality: insurers and other coverage providers recruit the members of associations with better individual claims experience, and sometimes offer artificially low premium or contribution rates for the first year of coverage, knowing that the group's existing plan will cover "tail claims" for services performed but not yet billed before the change in coverage, leading to favorable claims experience in the first year. The same employer will likely find that rates increase in a subsequent year, and may seek to rejoin the association plan to avoid the increase. Such changes in a risk pool can destabilize an association plan. To promote stability, the NBA VEBA currently uses contractual and eligibility limitations like those described in the previous paragraph to make short-term changes in coverage (and membership) less appealing.

The NBA VEBA respectfully submits that so long as an association health plan discloses any contractual and/or eligibility limitations on reentry or termination charges clearly and in advance, they do not present a policy or enforcement concern. Applied uniformly over all members, such limitations do not present a risk of discrimination based on health factors. The Department should therefore revise the statement in the preamble, relating to the purported requirement to accept all employers meeting non-health-based criteria, to clarify that a group or association may use reasonable contractual and/or eligibility limitations on discontinuing and recommencing group or association membership.

4. To ensure that a group or association acts in the interests of its employer members, the final regulation should prohibit associations from conditioning eligibility for group health plan coverage on the purchase of other goods or services.

The Proposed Regulation contains several measures intended to ensure that a group or association acts in the interest of its employer-members, as distinguished from purely commercial interests. See 83 Fed. Reg. at 620-22 (preamble discussion). However, the NBA VEBA respectfully observes that relaxing the commonality of interest requirements opens the door to the possibility that a group or association will condition eligibility for group health plan participation on an employer member purchasing a certain level of goods or services from the group or association. Such practices serve a group or association's commercial interests, rather than the interests of employer-members, and should be prohibited.

The NBA VEBA urges the Department to prohibit these practices in the final regulation, by revising Proposed Regulation Section 2510.3-5(b) to add the following condition:

> *(9) The group or association does not directly or indirectly condition membership or health coverage eligibility on the purchase of goods or other services from the group or association. For this purpose, an association that (a) requires reasonable membership dues of all its members; or (b) makes a good or service available to all persons who pay membership dues, shall not be considered to condition membership or health coverage eligibility on the purchase of such a good or service.*

5. To ensure that a group or association acts in the interests of its employer members and those members' employees and dependents, the final regulation should require the employer members of an association to have a genuine organizational relationship unrelated to the provision of benefits.

To qualify as a bona fide group or association of employers under the Proposed Regulation Section 2510.3-5(b), a group or association must only "(exist) for the purpose, in whole or in part, of sponsoring a group health plan that it offers its employer members." With this language, the Department proposes to remove the condition that is in effect under current DOL sub-regulatory guidance, requiring an employer association have a purpose other than offering health coverage. 83 Fed. Reg. at 619. The impetus for this change is to allow for expanded opportunities for employers to band together to provide group health coverage. Id.

The NBA VEBA cautions against a standard that completely rejects the current guidance for several reasons. First, current Department guidance does not preclude formation of a bona fide group or association of employers as is evidenced by existing association health plans. In addition, in reviewing requests for advisory opinions on this issue, the Department has indicated that a sub-group of employer members of a trade or industry association may constitute a bona fide group or association of employers acting as an "employer" within the meaning of ERISA § 3(5). See, e.g., Advisory Opinions 2017-02A, 2003-13A, 2005-25A, 2005-24A.[1] Thus, the condition that a group or association of employers has a purpose other than offering health coverage does not preclude new bona fide associations from forming, but requires that the employer members have some type of pre-existing organizational relationship. As this letter discusses, these pre-existing organizational relationships provide numerous benefits to association health plans.

Second, the NBA VEBA asserts that the condition of a genuine organizational relationship unrelated to the provision of benefits provides the better method of achieving the common employer interests that characterize an employee benefit plan than the proposed nondiscrimination provisions in the Proposed Regulations. The value of this type of preexisting relationship amongst employers is tied directly to the common economic and representational interest that the Department and the courts have found vital in creating the protective nexus employees rely on to represent their interests relating to the provision of benefits. The existing relationships and networks born out of a prior organizational connection provide for a significant degree of accountability as well as assisting with the development

and longevity of the association health plan. For example, a legitimate membership organization, like the NBA, will not risk its goodwill and reputation with its members by associating with a substandard association health plan. The NBA VEBA expresses its concern that eliminating this condition may in fact lead to a proliferation of association health plans that do not have the requisite cohesion and protective nexus integral to the success of the association and the protection of employees.

Third, and practically, requiring new bona fide groups or associations of employers to abide by the condition of a genuine organizational relationship unrelated to the provision of benefits will facilitate the development of successful, new association health plans. Association health plans whose employer member have access to the communication systems, networks, and history of cooperative ventures of an existing association will have a significant advantage as to the formation, development, and communication of a plan.

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[1] In its advisory opinions, the Department emphasizes that the pre-existing relationships between the employers – membership in a trade or industry association – satisfies the requirement that the sub-group of employers have a genuine organizational relationship unrelated to the provision of benefits. Advisory Opinions 2017-02A, 2003-13A, 2005-25A, 2005-24A.

Based on the foregoing reasoning, the NBA VEBA urges the Department to consider revising Proposed Regulation Section 2510.3-5(b)(1) to include the revision italicized below:

> (1) The group or association exists for the purpose, in whole or in part, of sponsoring a group health plan that it offers to its employer members*; provided that the employer members share some business or organizational purposes and functions unrelated to the provision of benefits*;

Alternatively, the Department could exempt associations and association health plans that establish a membership nexus to an existing association from all or a portion of the nondiscrimination requirements in Proposed Regulation Section 2510.3-5(d).

Conclusion

The NBA VEBA applauds the Department's efforts to enable more associations to offer group health plan coverage. It respectfully submits that the clarifications and revisions described above further that purpose and the policies the Department identified in the preamble to the Proposed Regulation. The NBA VEBA urges the Department to include the clarifications and revisions proffered in this letter in the final rule.

If you have questions, please contact legal counsel for the NBA VEBA, Michelle Sitorius, at (402) 474-6900 or msitorius@clinewilliams.com.

Very truly yours,

Scott Yank
Trust Administrator

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