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March 6, 2018

VIA ELECTRONIC SUBMISSION: http://www.regulations.gov

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: RIN 1210-AB85
Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: Comments on Proposed Regulations to Facilitate the Formation of Small Business Health Plans for Employers and Self-Employed Individuals With No Employees

To Whom It May Concern:

On behalf of the Associated General Contractors of America (hereinafter "AGC"), I thank you for the opportunity to submit the following comments on the U.S. Department of Labor (hereinafter "DOL" or "Department") Employee Benefits Security Administration's (hereinafter "EBSA") notice of proposed rulemaking (hereinafter "NPRM"), clarifying the definition of "employer" under Section 3(5) of the Employee Retirement Income Security Act (hereinafter "ERISA") for purposes of establishing a Small Business Health Plan (hereinafter "SBHP"). The NPRM was published in the Federal Register on January 5, 2018.

AGC is the leading association for the non-residential construction industry, representing more than 27,000 firms, including over 6,500 of America's leading general contractors and over 9,000 specialty contracting firms. More than 11,500 service providers and suppliers are also associated with AGC, all through a nationwide network of 90 chapters (hereinafter "AGC Chapters"). These firms, both union and open-shop, engage in the construction of buildings, shopping centers, factories, industrial facilities, warehouses, highways, bridges, tunnels, airports, water works facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects, municipal utilities and other improvements to real property.

AGC appreciates the Department's efforts to expand access to affordable health care options for small businesses (which describes the vast majority of firms in the construction industry). Currently, small businesses are finding it exceedingly difficult to offer affordable and quality health coverage to their employees due in large part to many of the insurance market reforms enacted under the Affordable Care Act (hereinafter the "ACA"). Some small employers are faced with a decision to discontinue the

health coverage they offer to their employees due to increased costs. Other small employers may not be offering health coverage at all, yet they continue to look for alternative health care options that may be available to them.

Importantly, a number of our AGC Chapters across the country have recognized the need to offer alternative health care options to their members. In response, these AGC Chapters have established an "association health plan" that offers "group health plan" coverage to employees of their members. Some AGC Chapters offer fully-insured group health plan coverage, while other AGC Chapters have opted to sponsor a self-insured group health plan. In either case, affordable and quality health care coverage is made available to AGC members as an alternative to the health coverage sold in their local "small group" insurance markets.

AGC and its Chapters are supportive of the flexibility the Department is seeking to provide to small employers and self-employed individuals with no employees (hereinafter referred to as "working owners) to make it easier for them to establish a fully-insured "large group" or self-insured SBHP. We believe this flexibility could allow AGC and its Chapters to examine the opportunity of banding together to provide health coverage to their respective members on a regional or national basis. However, AGC and its Chapters believe the Department must be mindful of the SBHPs that currently exist today (e.g., the "association health plans" currently sponsored by many of our AGC Chapters) and take the necessary steps to ensure that the proposed modifications to current law do not arbitrarily disrupt the affordable and quality health coverage that these arrangements consistently provide.

Responses to the Proposed Regulations

General Support for Modifications To the "Commonality of Interest" Test

To establish an SBHP, a group of employers must be considered a "bona fide group or association of employers" for purposes ERISA. To be considered "bona fide," the group must meet (1) the "commonality of interest" and (2) the "control" tests. The "commonality of interest" test is a facts and circumstances test which is not always easy to satisfy. According to the courts and existing Department guidance, a group of employers would *not* satisfy the "commonality of interest" test unless (1) the employer members are "related" (i.e., they are in the same industry) *and* (2) the employer members are located in the same State or tri-State area.

In the NPRM, the Department has opted to modify its interpretation of the various factors that must be present to satisfy the "commonality of interest" test. Under the proposal, a group of employers would meet the "commonality of interest" test if (1) the employers are in the same industry, line of business or profession or (2) the employers have a principal place of business in a particular State or metropolitan area (that may span more than one State).

"Related" Employers

With respect to the first proposed test, the Department has chosen to eliminate the geographical constraint for "related" employers. This would allow national trade associations – like AGC – to establish a fully-insured or self-insured SBHP, and offer such SBHP health coverage to employer members regardless of their geographic location. In other words, so long as the employer members are "related," SBHP health coverage could be offered to employer members located in all 50 States, or employers located in a particular region of the country. As stated above, AGC and its Chapters support this modification, and we urge the Department to finalize this proposal.

"Unrelated" Employers

With respect to the second proposed test, the Department maintains the geographical constraint, but eliminates the requirement that the employer members be "related." This would allow "unrelated" employers (i.e., employers in different industries) domiciled in a particular State to band together to establish a fully-insured or self-insured SBHP. While AGC and its Chapters are supportive of the flexibility the Department is seeking to provide, we are concerned that an "unrelated" employer-run group could act unscrupulously and lure away AGC members from participating in our Chapters' existing SBHPs. This would certainly have a negative impact on our members' employees' productivity and their overall business. Please note, we remain confident that the multiple benefits that a local AGC Chapter may offer to members (which include a number of non-health care-related benefits) – in addition to the SBHP health coverage that is offered – will ensure that our AGC members will remain enrolled in their current health plans. But, we do have reservations about the Department's decision to allow "unrelated" employers to form an SBHP.

Concern About the Proposal To Allow Groups To Be Formed for the Sole Purpose of Offering Health Insurance

AGC is concerned with the Department allowing a group or association to exist for the sole purpose – in whole or in part – of offering or providing health coverage to its members. AGC and its Chapters intimately understand the individual needs and fiscal constraints of the construction industry and its employees. AGC – as an organization – is also personally committed to the health and wellness of the industry. Therefore, AGC and its Chapters should continue to be able to tailor and offer health coverage that is in the best interest of its members without fear of other groups preying on our members solely to make a profit. However, AGC advises the Department to retain its previous sub-regulatory guidance providing that a group or association must exist for a "bona fide" purpose other than offering health coverage as a condition to being able to establish an SBHP.

Concerns About One of the Proposed Nondiscrimination Protections

As the Department knows – currently – single employer fully-insured "large" group and self-insured plans develop their premium rates based on the health claims experience of their employees (i.e., they engage in the practice of "experience-rating"). In addition, existing employer-run organizations sponsoring an SBHP – like AGC's Chapters – also engage in this practice of experience-rating. However, the Department proposes to disallow existing SBHPs from developing different premium rates for different employer members based on health claims experience. Unfortunately, this proposal would not only adversely impact an existing SBHP's ability to develop competitive premium rates for their employer members, but prohibiting SBHPs from experience-rating their employer members may force these plans into insolvency, thus requiring the organization to discontinue their group health plan coverage. Based on the foregoing, we urge the Department to remove this proposal from the final regulations.

Allowing an SBHP to Develop Different Premiums for Different Employer Members Based on Health Claims Experience Would Not Render the Proposed Nondiscrimination Protections Ineffective

The NPRM establishes four different nondiscrimination protections applicable to SBHPs. Under the first proposed nondiscrimination protection, an employer group cannot deny other employers and/or working owners membership in the group – and by extension participation in an SBHP – on account of

any "health factor" of an employee, a former employee, or the working owner. Under the second and third proposed nondiscrimination protections, the premiums for SBHP health coverage – and eligibility for benefits covered under the plan – cannot vary based on a particular participant's health factor. And under the fourth proposed nondiscrimination protection, an SBHP cannot experience-rate premiums for different employer members.

In the preamble of the NPRM, the Department explains that if this fourth nondiscrimination protection was not finalized, the first three nondiscrimination protections discussed above could be rendered ineffective (because an employer group could offer membership to all employers meeting the requisite membership criteria, but then charge specific employer members higher premiums based on their health-claims experience). However, AGC and our Chapters do not believe that these nondiscrimination protections would be rendered ineffective if an SBHP could develop premiums based on health claims experience.

For example, in cases where a prospective employer member may employ employees who utilize a significant amount of health care (i.e., "high-medical-utilizers"), this employer may benefit by finding more affordable health coverage through an SBHP, due to the fact that this employer *cannot* be denied membership in the employer group sponsoring the plan on account of these high-medical-utilizers. More affordable premium rates will likely be available to an employer with high-medical-utilizers because – on account of experience-rating – the SBHP will be able to attract employer members with "healthy" employees (by offering these employers a lower premium rate). The fact that these healthy risks may now be a part of the SBHP, these healthy risks are able to offset the exposure the high-medical utilizers may pose to the risk pool. This allows the SBHP to develop competitive premium rates for the employer with high-medical-utilizers, notwithstanding the fact that this employer's premiums may be higher than employer members with healthy employees.

In other words, by allowing an SBHP to develop different premiums for different employers, the SBHP will be able to offer competitive premium rates that *both* employers with healthy employees *and* employers with high-medical-utilizers may find attractive, which not only benefits the employer member (from a financial perspective), but also its employees (especially those employees who may be high-medical-utilizers because they may now have access to affordable and quality health coverage). This has been AGC's experience when it comes to our Chapters sponsoring and administering their existing SBHP.

With respect to the prohibition against varying premiums and eligibility for benefits based on any health factor, these are requirements that currently apply to existing group health plans today. As stated above, self-insured and fully-insured "large group" health plans develop their premium rates based on experience-rating. And, this current law prohibition against varying premiums or eligibility for benefits based on any health factor of a particular participant is in no way rendered ineffective by virtue of the existing experience-rating practice adopted by these plans. Allowing employer-run organizations sponsoring an SBHP to engage in the practice of experience-rating will similarly do nothing to change or inhibit the effectiveness of these nondiscrimination protections.

Developing Different Premiums for Different Members Would Be Done To Maintain the Solvency of the SBHP, Which Is "Acting In the Best Interest" of Employees

It is important to point out that AGC and its Chapters are employer-run organizations where our employer members govern (1) the operations of the organization and (2) the provision of SBHP health coverage through a Board elected by our members. This "control" is critical because it ensures that

our employer members sponsoring the SBHP are "acting in the best interest" of their employees. Contrary to the Department's belief, developing different premiums for each employer member based on their health claims experience is actually is done in furtherance of "acting in the best interest" of the employees covered under the SBHP. For example, if the SBHP did not develop different premium rates for particular employer members, the solvency of the SBHP might be called into question, and the employees currently covered under the plan may lose their health coverage.

As a result, to ensure that affordable and quality health coverage is consistently made available to our members' employees, our AGC Chapters are required to experience-rate their employer members to maintain their SBHP's solvency. Engaging in practices that would ensure the long-term viability of the SBHP is by definition "acting in the best interest" of employees participating the plan because, again, without experience-rating, our AGC Chapters would no longer be able to offer health coverage.

In addition, by experience-rating different employer members, an SBHP has a better chance to attract employer members with "healthy" employees who are then able to offset the health risks associated with high-medical-utilizers. This means that high-medical-utilizers can enjoy a competitive premium rate for affordable and quality health coverage, which is no doubt in these employees' "best interest." And, healthy employees can also enjoy a competitive rate relative to, for example, the small group market, which again, is in these employees' "best interest."

State Regulation of SBHPs

Fully-Insured "Large Group" SBHPs

The preamble of the NPRM explains that – in the Department's opinion – nothing in the proposal alters a State's authority to regulate insurance. We agree. We are concerned, however, that when it comes to a fully-insured "large group" SBHP, States may attempt to enact legislation or promulgate rules to re-characterize the large group SBHP as a "small group" health plan, thereby subjecting the fully-insured SBHP to the insurance rules applicable in the small group market. This State action would adversely affect our AGC Chapters that currently sponsor a fully-insured SBHP (which is currently treated as a "large group" plan by the insurance carrier under-writing the coverage).

While we recognize that the Department is currently not in a position to determine whether such a law or regulation would actually apply to a fully-insured "large group" SBHP (or whether the law would be preempted by ERISA), we urge the Department to consider clarifying this issue soon after final regulations are released.

Self-Insured SBHPs

In addition, we urge the Department to develop a "class exemption" that would shield a self-insured SBHP from the non-solvency requirements of a State "multiple employer welfare arrangement" (hereinafter "MEWA") law, provided specified Federal requirements are satisfied.

As the Department knows, a self-insured SBHP is by definition a self-insured MEWA. As the Department also knows, ERISA gives States the exclusive authority to impose any State insurance law requirement on a self-insured MEWA. Over the years, States have enacted their own State MEWA laws with varying degrees of regulation – ranging from restrictive to permissive. This has created a "patchwork" set of rules and requirements that a self-insured MEWA must meet if an employer group wants to offer self-insured health coverage to employer members located in multiple States.

Unfortunately, this fact may limit AGC's ability to establish a self-insured SBHP (because we would be required to navigate the different legal requirements and licensing practices in each State in which we might want to offer health coverage). The cost and time associated with complying with this "patchwork" set of regulations and licensing rules will likely be prohibitive. This fact would also limit the ability of our existing AGC Chapters to offer self-insured health coverage on a regional basis.

It is important to remember that Congress enacted ERISA to avoid the multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans. Consistent with the purpose of ERISA, developing a "class exemption" would provide a level of "uniformity" that would allow self-insured SBHPs to offer health coverage in multiple States free from the burden of complying with a set of regulations that differ State-by-State.

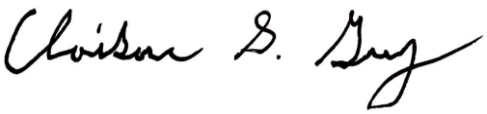
Please note, AGC and our Chapters are not suggesting that self-insured SBHPs should be freed from regulation, but rather, that such regulation should be uniform. And we believe that such uniformity could be accomplished through developing a "class exemption" with Federal rules that must first be met before a self-insured SBHP can avoid a State MEWA law's non-solvency requirements.

Providing specific suggestions on what may be considered "reasonable" and "appropriate" regulation of a self-insured SBHP through a "class exemption" is beyond the scope of this comment letter. However, AGC and our Chapters believe the Department should consider developing a "class exemption" that codifies an existing State MEWA statute that the Department – and outside stakeholders – believe provides an appropriate level of regulation and oversight. The "class exemption" may also require a specified number of lives be covered under the self-insured SBHP – as well as a requirement to meet a reasonable solvency requirement – as conditions to qualifying for the "class exemption." If and when the Department decides to issue such a "class exemption," we would welcome the opportunity to serve as a resource throughout the rulemaking process.

Conclusion

AGC reiterates its appreciation of the Department's efforts to expand access to affordable health care options to small businesses in the construction industry and hopes it will consider the impact the NPRM might have on our ability to provide health coverage to our member companies. AGC also appreciates the opportunity to engage in the rulemaking process and looks forward to working with EBSA as it continues to amend regulations that impact construction employers. If we can aid in any way, please do not hesitate to contact me.

Sincerely,



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