March 6, 2018

The Honorable Preston Rutledge
Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
Room N-5655
200 Constitution Avenue, NW
Washington, DC 20210

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

Dear Assistant Secretary Rutledge:

I am writing on behalf of Delta Dental Plans Association (Delta Dental) in response to the U.S. Department of Labor, Employee Benefits Security Administration's (EBSA) notice of proposed rulemaking entitled "Definition of 'Employer' Under Section 3(5) of ERISA—Association Health Plans" (NPRM) published in the Federal Register on January 5, 2018.

Across the nation, over 75 million Americans trust Delta Dental to ensure they have access to the oral health care they need. Through our 39 member companies, Delta Dental offers high quality dental coverage at affordable prices to individuals and employers of all sizes. This includes small businesses with 1 to 50 employees, which represent over 80 percent of Delta Dental's group customers.

Summary of the NPRM

The NPRM proposes modifying existing subregulatory criteria under the Employee Retirement Income Security Act section 3(5) in order to allow more employers to join association health plans (AHPs). Specifically, the NPRM would expand the definition of "commonality of interest" among employers to include:

1. the same industry, trade, or profession; or
2. geographical area (a metropolitan area or State).

This expanded definition would allow small employers and sole proprietors to join together for the express purpose of offering health coverage. The NPRM requests information on the issue of state preemption and seeks comments on how to define a metropolitan area and how to determine AHP eligibility.

Overarching Comments

Delta Dental supports what we understand to be the goal of the NPRM: Expanding coverage options for small businesses and others outside the large group market. Such efforts are increasingly important as enrollment in the Small Business Health Options Program continues to decline and alternative forms of coverage remain limited for many small businesses facing economic and competitive disadvantages in offering health coverage to their employees. Some Delta Dental member companies have been successful in providing oral health coverage to individuals in AHPs over the past several years. However, we have concerns about the broad scope of the NPRM and seek clarification regarding state authority, the definition of subsidized group health plan coverage, and how enrollees will be protected when participating in AHPs offered across state lines or in metropolitan areas that are regulated by more than one state.

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Requests for Clarification

Preemption of State Regulatory Authority:

The NPRM requests information on how to potentially exempt certain AHPs from state law, in order to promote health care choice and competition. 83 Fed. Reg. 614, 625. This request creates confusion because the current state-based regulatory structure is time-tested and appears to be working well for consumers, issuers, and regulators alike. Through the Multiple Employer Welfare Arrangement Act of 1983, Congress clearly recognized that states have the authority to regulate multiple employer welfare arrangements, of which AHPs are a type.[1] State oversight of AHPs is both appropriate and necessary so that state regulators are well positioned to protect consumers from risk of fraud, insolvency, and market instability. Further, identifying a distinct regulatory authority encourages a collaborative effort between regulators, consumers, and issuers - including Delta Dental member companies – that helps foster a regulatory environment where AHPs can thrive. We are encouraged that the NPRM does not include preemption language, and would continue to allow states to maintain their regulatory authority over these market structures that have been effectively established and work well for all stakeholders. However, the failure of the NPRM to clearly delegate oversight authority of AHPs to state regulators not only puts the potential growth of the AHP market in jeopardy, but also stands to endanger currently existing AHPs.

Recommendation: We recommend EBSA explicitly reaffirm that states maintain primary regulatory authority over AHPs.

Regulation of Multi-State AHPs:

The NPRM would allow employers to meet the "commonality of interest" test if they are in the same industry, trade, or profession, regardless of whether the AHP covers individuals in a single state, or in multiple states. In the regulatory analysis section on federalism, the NPRM indicates that its intended effect on state regulatory authority is limited. However, no clear proposal is provided as to how states will regulate multi-state AHPs. This raises a number of questions regarding which state would have the authority to regulate these products. For example, would oversight and enforcement authority belong to: the state in which the AHP is domiciled, the state in which the employee resides, or the state in which the employee works? Without a clear delineation of authority, there is confusion as to which state will be responsible for protecting consumers and issuers from fraudulent practices.

Recommendation: We recommend EBSA provide clarification and guidance to assist states in determining proper jurisdiction over multi-state plans.

Regulation of Metropolitan Areas:

The NPRM would allow employers to meet the "commonality of interest" test if they are located in the same metropolitan area or state. A major concern is the failure of the NPRM to clearly define a metropolitan area. This is important, as many metropolitan areas expand beyond the boundaries of a single state. While the NPRM provides examples recognizing the potential for AHPs to cross state boundaries in metropolitan areas, it provides no clear indication as to who has the regulatory authority in these undefined areas. In order for AHPs to be successful, there must be a partnership between state regulators, consumers, and issuers who are familiar with their local markets. In the absence of a distinct regulatory authority, oversight and enforcement mechanisms may remain unclear, putting consumers at risk of potential fraud and abuse. This could negatively impact new AHPs under the proposed rule, as well as existing AHPs in closely knit marketplaces.

Recommendation: We recommend EBSA clarify the definition of a metropolitan area, and the authority of a state regulator within that area, so that we may fully comment.

[1] Pub. L. No. 97-473, 96 Stat. 2613 (1983).

Treatment of HIPAA Excepted Benefits:

The NPRM seeks comments on an individual's eligibility for AHP coverage, based on whether they are offered other subsidized group health plan coverage through another employer or a spouse's employer. 83 Fed. Reg. 614, 622. However, the NPRM does not define subsidized group health plan coverage. Under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Congress clearly excepted certain benefits, including dental coverage, from many federal requirements otherwise applied to health insurance.[2] In the past, requirements meant to apply to major medical coverage have been mistakenly applied to excepted benefits, even though excepted benefits do not qualify as Minimum Essential Coverage. A clear distinction between major medical coverage and excepted benefits is necessary in order to ensure that the requirements of major medical plans are not inadvertently imposed on excepted benefits and that individuals retain access to excepted benefit products. For example, an individual with medical coverage through another employer should still be eligible to purchase an excepted benefit product, such as a stand-alone dental plan, through an AHP.

Recommendation: We recommend EBSA clarify that the NPRM does not affect the treatment of HIPAA excepted benefits offered as part of an AHP and that eligibility for an excepted benefit product through an AHP is not impacted by an individual's medical coverage status.

Thank you for the opportunity to comment on the NPRM. We are available to provide additional information, in writing or through discussion, on ways to expand access to oral health care for employees of small businesses and others outside the large group market. We have successfully expanded access for individuals in this space and are happy to bring our experience to bear on the discussion.

Sincerely,

Jason Daughn
Vice President, Government Relations

[2] Pub. L. No. 104-191, 110 Stat. 1936 (1996).