NEW YORK CITY BAR

By Electronic Submission
RIN 1210-AB85

March 6, 2018

The Honorable R. Alexander Acosta, Secretary of Labor
Office of Regulations and Interpretations
Employee Benefits Security Administration, Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington D.C. 20210

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

Dear Mr. Secretary:

The Association of the Bar of the City of New York (the "Association")[1], on behalf of its Small Law Firm Committee, respectfully submits the following comments and recommendations with respect to the above-referenced Proposed Rule that was announced by the Department of Labor (the "DOL") on February 4, 2018, and published in the Federal Register on January 5, 2018.[2]

The Association is a New York not-for-profit corporation, and is exempt from Federal income tax pursuant to Section 501(c)(6) of the Internal Revenue Code. Founded in 1870 as a professional membership organization, the Association's mission is to equip and mobilize the legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice. The Association has approximately 24,000 members, all of whom are law students or individual lawyers who may be admitted to practice law in New York, and who also may be admitted to practice in other states, including the contiguous states of Connecticut, New Jersey and Pennsylvania. Among its membership, sole practitioners[3] and members of small law firms[4] constitute one of the largest membership segments of the Association.

[1] The Association currently conducts its operations using the name "The New York City Bar Association". However, the Association is registered with the New York Department of State, the Charities Bureau of the Office of the New York Attorney General and the Internal Revenue Service under the name as first nominated above.

[2] 83 Fed. Reg. at 614.

[3] "Sole practitioner" or "solo practitioner" is the corollary term for "sole proprietor" typically used in the legal profession.

[4] The Association defines a "small law firm" as a law firm with no more than twenty-five lawyers. It defines a "large law firm" as one having more than twenty-five lawyers.

For decades, the Association offered a fully-insured association health plan ("AHP") to its membership until enactment in 2009 of the Patient Protection and Affordable Care Act ("PPACA"). Most of the participants under the health plan were sole practitioners or members of small law firms. Consequently, the Association has a substantial interest in the Proposed Rule and the amendment to the ERISA regulations contemplated by the DOL. Inasmuch as the DOL is now acting to amend the regulations under ERISA to expand access to health coverage by allowing more employers to form AHPs, the Association submits that the proposed Rule should be revised to, among other things, ensure that the Final Rule would permit plans like the one previously offered by the Association. Specifically, the Association respectfully recommends that the DOL revise the Proposed Rule to:

I. Confirm that associations, such as the Association, composed of individuals rather than employer organizations are qualified to offer a healthcare plan to their members;
II. Clarify the *bona fide* requirement with respect to the purpose of an organization and with respect to the requirement of control of the establishment and maintenance of a group health plan;
III. Redefine "working owner" and revisit the eligibility requirements for working owners to participate in an AHP;
IV. Remove the disqualification from participation in an AHP where a working owner may specialize in multiple areas, or may be married to someone who is eligible to participate in another health plan;
V. Coordinate with HHS with respect to its apparent overlapping, but inconsistent, regulation;
VI. Clarify the exemption from further state regulation other than with respect to contribution and reserve requirements;
VII. Clarify the definition of metropolitan area;
VIII. Allay DOL concerns about manipulation of geographical classifications; and
IX. Defer additional or different nondiscrimination protections or additional limits on price flexibility.

I. CONFIRM THAT ASSOCIATIONS, SUCH AS THE ASSOCIATION, COMPOSED OF INDIVIDUALS RATHER THAN EMPLOYER ORGANIZATIONS ARE QUALIFIED TO OFFER A HEALTHCARE PLAN TO THEIR MEMBERS

The President's October 12, 2017 Executive Order 13810 (the "Executive Order") stated that large employers often are able to secure better healthcare plan terms than small employers, and that expanding access to AHPs could help small businesses (a) overcome competitive cost disadvantages, (b) avoid many of PPACA's costly requirements, and (c) gain additional, more affordable health insurance choices for many Americans.[5] The Executive Order further stated that the Administration would continue its focus on promoting competition in the healthcare markets, expanding availability of and access to insurance alternatives, improving information needed to make informed healthcare decisions and minimizing reporting burdens.[6] Toward those ends, the Executive Order directed the DOL to propose regulations to (a) expand access to health

[5] Executive Order § 1(b)(i).

[6] Executive Order § 1 (c)(i-iii).

coverage by allowing employers to form AHPs, (b) consider expanding the conditions that satisfy the commonality-of-interest requirements, and (c) consider ways to promote AHP formation on the basis of common geography or industry.[7]

The Association, like most other organizations of lawyers, is a membership organization composed exclusively of individual members. The individual members of the Association may work as sole practitioners, as partners (i.e., employers) or employees in small law firms or large law firms[8], in corporate organizations or in government, not-for-profit organizations or academia. The Proposed Rule contemplates that an "employer" for purposes of Section 3(5) of ERISA includes "any person acting directly as an employer, or *any person acting indirectly in the interest of an employer* in relation to an employee benefit plan."[9] The Proposed Rule is clear that individuals who have an ownership interest in their firms, such as a partner of a law firm or a sole practitioner who is a "working owner," qualify for participation in an AHP. However, it is unclear whether a lawyer employed at a business, nonprofit or law firm would be eligible to participate in an AHP offered through the Association. Is a lawyer employee a "person acting indirectly in the interest of an employer in relation to an employee benefit plan"? On the one hand, if the person must be acting as an agent for the employer, a lawyer employee may not be eligible to participate in an AHP. On the other hand, a lawyer employee arguably could be eligible because that lawyer employee indirectly benefits the interest of an employer to keep valuable personnel by ensuring health insurance coverage to an employee for which the employer cannot otherwise provide.

Furthermore, although the structure of the Proposed Rule appears directed to employers as defined under ERISA, Example 3 under the Nondiscrimination section (Sec. 2510.3-(5)(d)) suggests that plumbers employed by a plumbing company in the state and working on a full-time basis are eligible for health insurance offered by, presumably, an association of plumbers regardless of whether the company that employs the plumber is a member of the association or otherwise participates in the AHP. Accordingly, we respectfully submit that expanding or interpreting the definition of employer to enable lawyers and other employees to participate in an AHP in their respective professional association or industry organization would be consistent with Sec. 2 of the Executive Order calling for the Secretary of the DOL to expand access, to expand the conditions that satisfy the commonality-of-interest requirements and to promote AHP formation on the basis of industry.

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[7] Executive Order § 2.

[8] The Association's definition of "large firm" differs from the Public Health Service Act ("PSA")'s definition of "large employer". As previously noted, the Association defines a large firm as having more than twenty-five lawyers. However, if such law firm has fewer than fifty employees, it would not currently qualify as a large employer under the PSA.

[9] Sec. 2510.3-5(a) (emphasis added).

II. CLARIFY THE BONA FIDE REQUIREMENT WITH RESPECT TO THE PURPOSE OF AN ORGANIZATION AND WITH RESPECT TO THE REQUIREMENT OF CONTROL OF THE ESTABLISHMENT AND MAINTENANCE OF A GROUP HEALTH PLAN

The stated purpose of the Proposed Rule is to expand access to health coverage by establishing a blueprint for the formation of a group or association for the purpose of sponsoring a group health plan that it offers "to its employer members". However, the Proposed Rule is ambiguous as to whether it includes the formation of an AHP by a pre-existing "membership" association and organization, and is unique in its definition of a *bona fide* group or association or other corporate organization.

Sec. 2510.3-5(b)(1) is too restrictive and should be deleted or amended.

Historically, organization or formation of a corporation under state corporate law, whether for business or as a not-for-profit organization, has entailed compliance with the requirements for due incorporation, valid existence and continued good standing. To our knowledge, there is no state law requirement, or any federal requirement to qualify for exemption from federal income tax under IRC § 501(c)(6), that the corporate organization or association "exist[] for the purpose, in whole or in part, of sponsoring a group health care plan...." Accordingly, the additional language limiting the definition of a *bona fide* organization to an entity that "exists for the purpose, in whole or in part, of sponsoring a group health plan..." should be deleted or, at the very least, modified as suggested below.

We respectfully submit that this language in the Proposed Rule not only departs from sub-regulatory guidance, but also inadvertently limits the types of organizations that may sponsor an ERISA-qualified employee welfare benefit plan ("EWBP"). Under the Proposed Rule, a pre-existing membership association or organization, including the nearly 150-year old Association, may not qualify as a *bona fide group or association*, because it does not exist "for the purpose, in whole or in part, of sponsoring a group health plan that it offers to its employer members." Nothing in the Executive Order suggests that such pre-existing membership associations are to be excluded from sponsoring an EWBP and, in fact, such an exclusion appears to be contrary to the intent and stated purposes of the Executive Order.[10]

Alternatively, rather than deleting the provision, the DOL could codify sub-regulatory guidance to clarify that pre-existing groups or associations that may exist for a *bona fide* purpose, other than offering health coverage, also qualify as employers for purposes of Section 3(5) of ERISA. Additionally, where the proposed sponsoring group or association has qualification concerns, the DOL may want to consider providing a "no-action" mechanism that allows such organizations to obtain pre-clearance from the DOL.

[10] As the Association is a pre-existing association, our attention is focused on the particular circumstances of the Association. However, we respectfully submit that any group or association (or other organization) that has *bona fide* purposes, unrelated to offering a health plan to its members, should be eligible to form an AHP regardless of whether it is pre-existing or in formation following adoption of any Final Rule.

Sec. 2510.3-5(b)(2) is too restrictive and should be deleted or amended.

Paragraph (b)(2) of the Proposed Rule requires that each employer member "is a person acting directly as an employer of at least one employee who is a participant covered under the plan." However, as noted above, the definition of "employer" in Paragraph (a) of the Proposed Rule defines an employer as "any person acting directly as an employer, *or any person acting indirectly in the interest of an employer..."* (emphasis added); and Paragraph (e) includes the new definition of sole practitioners as "working owners". Thus, Paragraph (b)(2) appears to require that participants in the AHP have at least one employee or otherwise constitute both the employer and employee as a working owner.

Although many of the Association's members are partners of law firms or have an ownership interest in a corporation, limited liability company, or other corporate form and may, thus, qualify as either employers or working owners, many others are individuals who are employees. As discussed in Point 1 above, such individuals may be construed as acting *indirectly* in the interest of an employer.[11] We respectfully submit that such lawyers who are members of the professionally-recognized Association should be eligible to participate in an AHP sponsored by the Association regardless of whether they have "at least one employee" who is a participant covered under the plan. Such an interpretation is, in our view, consistent with the spirit, if not direction, of the Executive Order. Accordingly, we respectfully submit that Paragraph (b)(2) should be deleted. Alternatively, Paragraph (b)(2) should be amended to provide consistency in the definition of "employer" throughout the Proposed Rule and to clarify that employers are not required to have "at least one employee who is a participant covered under the plan" in order to participate in an AHP.

Sec. 2510.3-5(b)(3-8).

The Association anticipates that it would qualify as a *bona fide* group or association without further amendment under Paragraphs (b)(3-8) of the Proposed Rule. We note, however, that various forms of organizations, including limited liability corporations, religious organizations and cooperatives, may have a "governmental structure" but not necessarily a "governmental body",[12] and may or may not have bylaws or similar indications of formality.[13]

Notably, the IRS does not require special provisions in an organization's governing

[11] We recognize the commentary in the preamble to the Proposed Rule that states, "The [DOL] notes that this preamble and the proposed rule do not address the application of the ERISA section 3(5) statutory phrase, 'acting ...indirectly in the interest'...in any context other than as applied to an employer group or association sponsoring an AHP." However, we respectfully submit that the juxtaposition of the Paragraph (a) definition of "employer" with the requirement of Paragraph (b)(2) "employer member" invites confusion and does not address the implications of the aforementioned statutory phrase even in the context of an employer group or association sponsoring an AHP.

[12] We recognize the need and importance of prudence and loyalty requirements of the sponsors and managers of an AHP. However, we merely point out that the structure contemplated by the Proposed Rule may not be applicable to the myriad forms of groups, associations and other organizations that may seek to create an AHP.

[13] For example, although a New York limited liability company is required to adopt Articles of Organization, we understand that such an organizational document is not required to be organized and recognized as an LLC in other states.

instruments to apply or qualify for exemption under IRC § 501(c)(6). We recommend that, as an alternative to determining whether an organization is *bona fide* under Paragraph (b) of the Proposed Rule, the DOL rely on the IRS's determination that such group or association is already qualified for exemption under IRC § 501(c)(6).

III. REDEFINE "WORKING OWNER" AND REVISIT THE ELIGIBILITY REQUIREMENTS FOR WORKING OWNERS TO PARTICIPATE IN AN AHP

The Association notes that the DOL has included sole practitioners and proprietorships, designated as "working owners", as qualified participants of an AHP under Paragraphs (b)(2) and (6) of the Proposed Rule. Expanding eligibility to participate in an AHP in this manner would encompass many of the Association's members who are sole practitioners.

Sec. 2510.3-5(e)(2)(iv)(A&B) should be amended or deleted as it is impractical to define, unworkable to implement and infeasible to review or enforce.

We understand DOL's stated need to ensure that sole practitioners conduct meaningful activities in their respective fields in the context of an employment relationship to qualify for ERISA-based employment benefits such as a health plan. We also recognize that the income requirement set forth in Paragraph (e)(2)(iv) derives from IRC § 162(l). However, IRC § 162(l) concerns the deductibility of expenses already incurred in a preceding reporting period. This income requirement is not relevant to determining whether a sole practitioner's professional practice or business enterprise is legitimate, and is not an accurate indicator of future business activities. Additionally, the IRS does not impose under IRC § 162(l) any minimum time requirements per week or per month.

Paragraph (e)(2)(iv)(A&B) of the Proposed Rule imposes threshold eligibility requirements that must be met before a working owner may participate in an AHP or incur the cost of participating in a health plan offered by an AHP. However, the Proposed Rule provides no time frame for making the determination (or self-certification). Moreover, earned income is determined by the results of a prior period while premiums are paid for health insurance covering future periods that are typically 12 months in duration. While the DOL's attempt to restrict participation in AHPs to sole practitioners with legitimate businesses is laudable, we respectfully submit that earned income from a prior period is not an accurate proxy for determining whether a solo law practice is a legitimate going concern and/or whether it can afford to pay health insurance premiums for the coming 12-month period.

For example, if a working owner did not have earned income in the prior tax year greater than the proposed cost of health insurance, would the working owner be ineligible to participate in the AHP in the current tax year to cover the working owner's healthcare costs for the next 12 months? What if the time period were measured in quarterly increments determined every 3 months, and the working owner had, after the most recently completed quarter, earned income sufficient to cover the cost of the health insurance plan for the upcoming quarter. However, at the end of the quarter, the working owner might not have earned income to cover the quarterly cost of health insurance for the following quarter. Under the Proposed Rule, the working owner may be expected to default on that quarterly payment and withdraw from participating in the

AHP, then reapply for insurance when his or her earned income from the practice is sufficient at the end of the period to cover the premium in the subsequent quarter. Typically, insurance lapses after 30 days if the insured fails to pay premiums when due; however, a policy does not resume 90 days later if a premium payment is then made. Thus, looking at income from a prior period to determine eligibility for current or future participation in an AHP yields an unworkable result.

IRC § 162(l)(2)(B) also prohibits the deduction by a self-employed taxpayer of healthcare expenses in any month in which such taxpayer is eligible to participate in any subsidized health plan *maintained by any employer of such taxpayer, or of the spouse of* the taxpayer. Although this provision substantially mirrors the limitation imposed on working owners in Paragraph (e)(2)(iii) of the Proposed Rule, the reasons for using the same limitation in the Proposed Rule and in IRC § 162(l) are entirely different.

The rationale for prohibiting the deduction in IRC § 162(l) is ostensibly to prohibit duplicative tax deductions that lower tax revenues at society's expense. In contrast, the rationale for imposing the limitation under the Proposed Rule appears to stem from a concern that providing sole practitioners with a choice between two or more health plans may adversely affect the insurance markets and risk pools, or otherwise result in instability in the pricing of health plans. However, as noted above, providing such choices to sole practitioners is consistent with the Executive Order to expand options to small employers and sole practitioners so as to enable them to overcome their economic disadvantage vis-à-vis large employers that have more health plan choices and can obtain better terms (and presumably better pricing) on health insurance.

Accordingly, the Association respectfully submits that the criteria for eligibility for treatment as a "working owner" set forth in the Proposed Rule should be modified or redefined to remove the time and income requirements.

IV. REMOVE THE DISQUALIFICATION FROM PARTICIPATION IN AN AHP WHERE AN OWNER WORKER MAY SPECIALIZE IN MULTIPLE AREAS, OR MAY BE MARRIED TO SOMEONE WHO IS ELIGIBLE TO PARTICIPATE IN ANOTHER HEALTH PLAN

Sec. 2510.3-5(e)(2)(iii) should be amended or deleted to remove the marriage penalty.

Certain requirements to qualify as a "working owner" eligible to participate in an AHP make sense, e.g., requiring ownership rights in a trade or business, and earning wages or self-employment income by providing personal services to the trade or business. However, Paragraph (e)(2)(iii) of the Proposed Rule also states that a sole practitioner is not eligible to participate in any subsidized health plan "*maintained by any other employer of the individual or of the spouse of the individual."* (Emphasis added.)

One of the purposes of the Executive Order is to expand access to health coverage by allowing more employers to form AHPs. The underlying rationale noted by the Executive Order is that "Expanding access to AHPs would provide more affordable health insurance options to many Americans..."[14]

[14] Executive Order § 1(b)(i) (emphasis added).

A sole practitioner's eligibility for access to affordable health insurance offered by an AHP should not depend on whether his or her spouse works for an employer that maintains a subsidized group health plan. We respectfully submit that the intent of the Executive Order was to provide more health insurance options, not fewer, and certainly not to condition those health insurance options on the specifics of an individual's marriage.

Furthermore, if a practicing lawyer (or other professional) has multiple qualifications (e.g., accounting, business consulting, MBA, MD), the lawyer realistically may be a sole practitioner in one profession and work for, or be in a separate partnership in, a second profession. Such an individual should have the option of choosing among health plans offered by competing industry-specific associations, and not be prohibited from choosing between alternative health plans simply because the individual is trained in multiple disciplines or works in different professions or industries.

Accordingly, we recommend that Paragraph (e)(2)(iii) of the Proposed Rule be deleted.

V. NEED FOR COORDINATION WITH THE DEPARTMENT OF HEALTH AND HUMAN SERVICES ("DHHS") WITH RESPECT TO ITS APPARENT OVERLAPPING, BUT INCONSISTENT REGULATION

Another concern is the impact of the Proposed Rule, if adopted as a Final Rule of the DOL, on the enforcement rules of DHHS under Title 45 CFR Part 144 et seq., and particularly 45 CFR § 144.102(c).

45 CFR § 144.102 states in pertinent part:

> (c) Coverage that is provided to associations, but not related to employment, and sold to individuals is not considered group coverage under 45 CFR parts 144 through 148. If the coverage is offered to an association member other than in connection with a group health plan, the coverage is considered individual health insurance coverage for purposes of 45 CFR parts 144 through 148. The coverage is considered coverage in the individual market, regardless of whether it is considered group coverage under state law. If the health insurance coverage is offered in connection with a group health plan as defined at 45 CFR 144.103, it is considered group health insurance coverage for purposes of 45 CFR parts 144 through 148.

As noted above, the Association, like many other associations of lawyers (and others), is composed of individual members, many of whom are partners in their respective firms or sole practitioners of their own practices. We believe those members would be eligible as employers to participate in an AHP offered by the Association under a "group health plan" as defined in Sec. 733(a)(1) of ERISA and as identified above. However, if as recommended above, the DOL includes lawyers who are employees into its definition of "employer," then we also recommend that DOL coordinate with DHHS to amend 45 CFR § 144.102(c) to conform with the expanded definition of "employer" contemplated under the Proposed Rule.

Alternatively, the DOL may want to consider revising the definition of "employee organization" to recognize not only organizations composed solely of union members but also associations, such as the Association, that are composed, in whole or in part, of individual lawyers who are employees of small companies, public service organizations or not-for-profit corporations.[15]

VI. CLARIFY THE EXEMPTION FROM FURTHER STATE REGULATION OTHER THAN WITH RESPECT TO CONTRIBUTIONS AND RESERVES

The Association respectfully requests that the DOL clarify in any Final Rule that an AHP, as expanded pursuant to the Proposed Rule, would continue to constitute a form of multiple employer welfare plan ("MEWA") and, if fully insured, would continue to qualify as an employee welfare benefit plan ("EWBP") under ERISA. Any such AHP qualifying under ERISA as an EWBP would, therefore, continue to be subject to state laws as to contributions and reserve levels, but would be exempt from other state compliance requirements.

VII. CLARIFY THE DEFINITION OF METROPOLITAN AREA

Section 2510.3-5(c)(2) should not be limited to "region" or "metropolitan area".

An association of lawyers should qualify as eligible to establish an AHP under Paragraph (c)(1) because all of its members are in the same profession and without being subject to undue geographical limitations. To that end, the Association respectfully submits this comment in response to the request of the DOL to address the definition of "metropolitan area" under Paragraph (c)(2).

Some associations or organizations may be regional, while others may reach more broadly—for example, national organizations with membership rolls that may be concentrated in, but not confined to, specific geographic regions.[16] Such associations and organizations may have members with offices located outside many standard measurements of statistical areas, including Standard Metropolitan Statistical Areas ("SMSAs"), Metropolitan Statistical Areas ("MSAs"), Core-Based Statistical Areas ("CBSAs"), Consolidated Metropolitan Statistical Areas ("CMSAs"), Primary Metropolitan Statistical Areas ("PMSAs") or the definition of Metropolitan Areas ("MAs") generally as such terms are set forth in Bulletin 98-06 of the Office of Management and Budget ("OMB"). Indeed, an association that qualifies under the same industry or profession requirements of Paragraph (c)(1) could reasonably be expected to have members eligible to participate in an association-sponsored AHP wherever they may be located.

We respectfully submit that the DOL should enlarge the definition of "region" or

[15] We respectfully submit that just as a sole practitioner can be construed as both an employer and an employee, an organization, such as the Association, can be construed as an organization composed of both employer members and employee members.

[16] For example, organizations that support veterans, scouts or activities, only some of whose members may be employers.

"metropolitan area" beyond OMB-designated regions to allow industry-based and professional organizations to offer an AHP regardless of where their members' offices may be located.

VIII. MANIPULATION OF GEOGRAPHICAL CLASSIFICATIONS

We cannot speculate as to the motivation of organizers of associations to be formed after adoption of any Final Rule that expands the ability of an association to create and maintain an AHP. However, to the extent that the experience of the Association may be representative of other pre-existing associations, or is indicative of any trend, the Association has over time expanded its membership base, and has embraced members who work increasingly distant from the Association or New York City. Geographically, the Association distinguishes such memberships by whether the member has an office within New York City, or in the suburbs or beyond 50 miles of the City solely for purposes of collecting periodic dues. Every member enjoys the same access to, and range of, benefits offered by the Association wherever that member's office may be located. We have no basis to believe other presently existing associations behave differently with respect to extending benefits to all of its members. Additionally, we believe the DOL already has sufficient oversight to determine eligibility of any ERISA-qualified EWBP, and that concerns for additional regulation with respect to manipulation of geographic classifications should be allayed, or at least deferred until further experience with AHPs is developed under the regulations issued under Sec. 3(5) of ERISA as proposed to be amended.

IX. LIMITED NEED FOR ADDITIONAL OR DIFFERENT NON-DISCRIMINATION PROTECTIONS OR ADDITIONAL LIMITS ON PRICE FLEXIBILITY

If the DOL adopts the nondiscrimination provisions of Paragraph (d) in the Final Rule, we recommend the following: Paragraph (d) should be amended to provide that a *bona fide* group or association must accept as members all applicants for membership who satisfy one of the two “commonality of interest” options in Paragraph (c). If a group or association is formed to attract as members people who are in a specific trade, industry, line of business or profession, such group or association should be required to accept as members all persons who apply and are in the designated trade, industry, line of business or profession.

Paragraph (d) should also be amended to provide that, if an association is formed exclusively for members in a specific region, that region should contain a minimum number of potential members to ensure the association is not formed to provide a private inurement to a very limited number of individuals.

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Thank you for the opportunity to comment on the Proposed Rule. We commend the DOL for its efforts. For the foregoing reasons, the Association recommends the above changes to the Proposed Rule and we are grateful for your consideration.

Respectfully submitted,

Bret I. Parker
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Gary M. Kaufman
Chair, Small Law Firm Committee