



NATIONAL INDEPENDENT AUTOMOBILE DEALERS ASSOCIATION

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Submitted electronically via regulations.gov

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

Attn.: Definition of Employer—Small Business Health Plans
RIN 1210-AB85

Dear Mr. Secretary,

The National Independent Automobile Dealers Association (NIADA) submits the following comments to the Department of Labor (DOL) Notice of Proposed Rulemaking (NPRM) entitled “Definition of ‘Employer’ Under Section 3(5) of ERISA – Association Health Plans” published in the *Federal Register* on January 5, 2018. The NPRM proposes a change to the definition of “employer” that would broaden the criteria under ERISA section 3(5) for determining when employers may join together to facilitate establishment of more Association Health Plans (AHPs) as multiple employer health insurance plans.

As health insurance premiums have increased over the past decade, small owners and employees have found themselves at a disadvantage in bearing higher insurance costs when compared to employees of larger entities. NIADA applauds the DOL’s willingness to engage in public discussions, including this proposed rulemaking, to make health insurance affordable for more Americans, especially the millions of entrepreneurs that make up the backbone of the American economy.

Background of NIADA

NIADA is the national trade associations representing the used motor vehicle industry comprised of more than 38,000 licensed used car dealers. NIADA's members include independent automobile dealers, unaffiliated with any franchise, that sell used vehicles wholesale, retail, and buy here pay here.

Since 1946, NIADA has represented the voice and interests of used car dealers in Washington, D.C. Coupled with its state association network across the country, NIADA's grass-roots framework provides a dual layer of advocacy unmatched in the used motor vehicle industry.

For 72 years, NIADA has engineered programs and leveraged technology to fulfill its mission to advance, educate, and promote the independent, used car dealer. NIADA stands tall for its members who subscribe to a strict Code of Ethics of duty, honor and integrity and who believe in the advancement of small business in support of the free-market system.

NIADA members embody the spirit of American entrepreneurship, and as a result, NIADA is dedicated to ensuring the success of small businesses. Nearly 50 percent of NIADA's dealer members have five or fewer employees. They are, by every criteria of the Small Business Administration, small businesses looking to survive in the best of times and the worst of times. As small businesses on Main Street in towns all across America, NIADA members are uniquely qualified to discuss the impact this type of rule would have on small businesses looking to survive in challenging economic circumstances.

NIADA supports the essence of the proposed rule and DOL's efforts to allow associations of all types to provide health insurance to members through AHPs. AHPs allow membership organizations such as NIADA to aggregate the work force and take advantage of the flexibility and lower costs currently available only to large employers. Large group plans often provide greater flexibility in developing appropriate coverage for the participants and are much more cost efficient than forcing small businesses to purchase on the individual marketplace.

Many NIADA members have stated that one of their top concerns is finding and retaining qualified employees. When considering potential job opportunities, benefits made available from an employer are often at the top of a potential employee's list of consideration. Many of NIADA's members do not currently have the wherewithal to offer health insurance as a benefit to employees. By being able to participate in an AHP, NIADA's small business dealers will be able to offer more competitive benefits, allowing them to compete with large employers to retain and recruit employees with the best talent.

DOL Should Limit Formation of AHPs to Associations Meeting Specific Criteria

Although NIADA is largely supportive of the DOL's efforts to broaden access to affordable health insurance to small businesses, we do have some concerns with the NPRM and ask the DOL to consider them before finalizing the rule. At the forefront of those concerns is the broad language that would permit anyone to form an AHP without any clear connection to a legitimate association. A lack of a connection to a legitimate association could lead to bad actors organizing an AHP and offering thinly capitalized plans collecting premiums but dodging payment of claims when due.

The DOL should limit the formation of AHPs to bona fide, legitimate associations meeting the following criteria:

- A clear connection to an existing membership base where the members govern the association through bylaws defining member participation rights
- Organized as a non-profit corporation with a federal tax exemption from the IRS
- Have been incorporated for at least 5 years
- Provide substantial activities, programs and/or benefits other than the AHP
- Have members confirm membership at least annually
- Have members who share a common industry, profession, or field (i.e. car dealer)
- Designate the individual(s) charged with operation or management of the AHP to be a fiduciary under ERISA

For example, NIADA is now in its 72nd year of existence and offers advocacy, education and training, and a host of other benefits to its nearly 17,000 members. Those members actively renew their memberships annually, and have the opportunity to elect the officers of the association from the body of the NIADA dealer membership.

The Rule Should Clearly Define Federal Preemption

In addition to this concern about randomly created AHPs, NIADA is also concerned about the lack of federal preemption in the proposed rule. NIADA membership reaches all 50 states. The sustainability of an NIADA AHP will be severely constrained if the AHP must comply with the myriad of differing regulations in each state. Without clearly stated federal preemption, the AHP would have to offer several different plans, at different costs and with escalating compliance requirements depending on an individual state's regulatory framework. This would make it much more difficult to achieve the economies of scale to lower costs – a key goal of the Administration. Even with clearly defined federal preemption, the DOL could design a regulatory framework that allows states to continue pursuing their consumer protection roles without intruding on ERISA's purpose of promoting employee benefits by implementing uniform standards of conduct.

Additionally, in order to enjoy the same advantages that a large employer has with a self-funded plan, the AHP should be considered the "employer" for the purposes of offering the health insurance, and should not be characterized as a Multiple Employer Welfare Arrangement (MWEA). NIADA believes that the organizational structure, governance and participation requirements applicable to AHPs, in connection with the proposed suggestions provided herein for a clear connection to legitimate associations, will put AHPs on par with single employer plans which currently enjoy federal preemption under ERISA.

DOL Should Change the Definition of Working Owner

NIADA supports the expansion of coverage under an AHP to "working owners," but we are concerned with the definition of that term in the proposed rule. DOL should modify the definition to eliminate the requirement that the individual must not be eligible for subsidized group health coverage under a group plan offered from another employer of the individual or individual's spouse. Alternative coverage through another employer – individual's or spouse's – may not be the most economically advantageous or appropriate coverage option for the working owner or his or her family. Creating

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hardships through this rule by preventing the “working owner” from having access to a preferable AHP option runs counter to the Administration’s goal of lowering health care costs.

Conclusion

NIADA wholly supports the DOL’s efforts to increase access to cheaper health insurance for small businesses through expanding access to AHPs. Properly structured AHPs with a tie to legitimate associations, clearly defined federal preemption and access for all working owners will results in lower costs and greater access to health care for small business employers and their employees.

Thank you for consideration of these comments. NIADA welcomes the opportunity to engage and assist you as you give further consideration to the proposed rule

Sincerely,



Senior Vice President
Legal and Government Affairs