Ogletree Deakins

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
Attorneys at Law
111 Monument Circle, Suite 4600
Indianapolis, IN 46204
Telephone: 317.916.1300
Facsimile: 317.916.9076
www.ogletree.com

Stephanie Alden Smithey
317.916.2501
stephanie.smithey@ogletree.com

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Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210
Attention: Definition of Employer—Small Business Health Plans, RIN 1210-AB85

RE: RIN 1210-AB85; Definition of "Employer" under Section 3(5) of ERISA—Association Health Plans

Dear Sir or Madam:

We write on behalf of the IBA Group Insurance Trust ("IBA Trust") to provide comments regarding the notice of proposed rulemaking published in the Federal Register on January 5, 2018, by the Department of Labor (the "Department") entitled "Definition of Employer Under Section 3(5) of ERISA-Association Health Plans" ("Proposed Regulation"), RIN 1210-AB85.[1]

The IBA Trust is a multiple employer welfare plan ("MEWA") which is a tax-exempt voluntary employees beneficiary association ("VEBA") under Internal Revenue Code Section 501(c)(9). The IBA Trust provides health, life and disability benefits to about 3800 employees who are employed by more than 50 small financial institutions in Indiana. The financial institutions all belong to the Indiana Bankers Association ("IBA"). The IBA Trust is fully insured. It was created in 1957, and it is operated by a Board of Trustees that is elected by the IBA member employers that participate in the Trust. The activities of the Board of Trustees are governed by a trust agreement.

The mission of the IBA is to offer forums, discussion groups and conferences to keep its members current, and to provide training in essential banking principles, such as audits, security compliance, commercial lending, human resources, information technology, teller training and branch management, and to provide advocacy for the banking industry at the state and federal levels of government.

The Proposed Regulation requests comments regarding the Department's proposal to broaden the criteria under Section 3(5) of the Employee Retirement Income Security Act of 1974 ("ERISA") for determining when employers may join together in an employer group or association

[1] 83 Fed. Reg. 614 (January 5, 2018).

that is treated as the employer sponsor of a single multiple-employer employee welfare benefit plan and group health plan.

IBA Trust's Position

The IBA Trust recognizes that expanding access to affordable health coverage among small employers supports its mission, and the IBA Trust strongly supports the Department's proposal to expand access to health coverage by loosening the standards for employers desiring to form association health plans ("AHPs"). Many of the members of the IBA are small financial institutions.

A number of other commenters responding to the Proposed Regulation claim it would lead to abusive practices by associations offering financially unstable plans with substandard benefits. We disagree. The interests of industry and trade associations like the IBA are tightly aligned with the interests of their constituent members. Industry and trade associations are founded on and guided by a single purpose, to advance the interests of their member employers, and they survive by doing that well. Member satisfaction with the value provided by association membership is critical to the success of the association. Such associations do not exist simply to sell health coverage. Associations that offer health plans to their members do so in an effort to respond to the needs of their members. But to meet those needs, the associations must offer health plans at price points and benefit levels that will be of benefit to their members. To do otherwise, and 'make a quick buck' off their membership by offering thinly funded plans with poor benefits, would be fruitless and self-destructive. As such, not only do we think the concerns of such commentators are overstated, but, as discussed further below, we also believe that in some respects, the Proposed Regulation unnecessarily restricts the ability of bona fide trade and industry association health plans like the IBA Trust to expand access to AHPs to small businesses.

IBA Trust's Recommendations

The Proposed Regulation was issued pursuant to Executive Order 13813, "Promoting Healthcare Choice and Competition Across the United States," which directed the Department to consider proposing rules to facilitate the purchase of insurance across state lines, expand access to AHPs, help small businesses overcome their competitive disadvantage relative to larger businesses, and expand access to health coverage by allowing more employers to form AHPs.[2] Accordingly, the final rule adopted by the Department should be guided by, and responsive to those directives. While the IBA Trust supports the Department's overall approach in broadening the availability of AHPs, we believe some modifications are needed to best achieve the aims of the Executive Order. As such, we urge the Department to consider the following recommended changes to the Proposed Regulation:

The nondiscrimination rules are unnecessarily burdensome as applied to industry associations. Proposed 29 C.F.R. § 2510.3-5(d) sets forth nondiscrimination rules by which all AHPs must abide. Those rules would, among other things, require AHPs to comply with the existing strong nondiscrimination rules found at 29 C.F.R. § 2590.702, which provide that AHPs

[2] 82 Fed. Reg. 48385 (October 17, 2017).

cannot condition membership, cannot discriminate in rules for eligibility or benefits, and cannot discriminate in premiums or contributions between groups of similarly situated individuals based on any health factor of an employee, former employee or a family member.

In addition to the existing nondiscrimination rules, subsection (d)(4) of proposed 29 C.F.R. § 2510.3-5(d) adds a new requirement. It provides that a group or association may not treat different employer members of the group as distinct groups of similarly situated individuals when applying the nondiscrimination rules. That concept is illustrated by an example that concludes an AHP cannot base an employer group's premiums for coverage on that employer group's history of high claims (see Example 4).[3]

We believe that this new requirement in proposed Subsection (d)(4) will dramatically impair the stability of trade association AHPs and hinder their ability to offer small businesses affordable coverage options, in clear contravention of the intent behind Executive Order 13813. Further, it will do so unnecessarily because the Department's concerns over risk selection are adequately addressed by Subsections (d)(1)-(d)(3) of proposed 29 C.F.R. § 2510.3-5 which incorporates the existing nondiscrimination rules already applicable to AHPs under 29 C.F.R. § 2590.702.

According to Department commentary in the preamble, the Proposed Regulation's nondiscrimination rules are intended to accomplish two objectives: first, to reduce risk selection by AHPs, and second, to distinguish genuine employment-based plans from "commercial enterprises that claim to be AHPs but that are more akin to traditional insurers selling insurance in the employer marketplace." However, the IBA Trust is concerned that the Proposed Regulation's subsection (d)(4) will destabilize AHPs and unnecessarily limit small employers' access to AHPs.

Subsection (d)(4) of the Proposed Regulation creates a single risk pool for the AHP. This puts small employers exactly where they are now – in a single risk pool. This single risk pool requirement is one of the ways in which small employers are disadvantaged in the current system, as noted in the preambles.[4]

The single risk pool destabilizes AHPs, and it removes one of the greatest advantages of AHPs, which is the ability to allocate the cost across the employers in a way that keeps healthy employers in the AHP and supports the employers that have a bad claims year, as all employers will periodically have a bad claims year. For instance, if the overall premium increase for an AHP for a year is 14%, it may be that some employers in the group would have had a 2% increase based on their own claims, and some would have had a 30% increase based on their own claims. If the AHP charges the "healthy" employers 14%, they will leave the AHP. If it charges the "sick" employers 30%, they will shop for other coverage and may find a carrier willing to give them a lower increase for the first year. This type of shopping by "healthy" and "sick" employers impairs the stability of the AHP.

Setting a band of premium increases across the AHP, so that no employer has an increase greater than X% or a decrease greater than Y%, is the best possible use of an AHP, and stabilizes

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[3] 83 Fed. Reg. 635-636.
[4] 83 Fed. Reg. 618.

the AHP's membership. A trade association AHP that cannot do this will lose both healthy and sick members. A trade association AHP will not abuse this power because its members have an existing relationship unrelated to the AHP and common interests through the trade association. This is what trade association AHPs have done successfully for decades. Removing this tool will destabilize the AHPs, remove their ability to provide affordable coverage to all, and put small employers where they were before the Proposed Regulation was adopted – in a single risk pool. Self-funding with stop loss is not a viable way for small employers to avoid an AHP's single risk pool. It is a risky option for a small employer because one very sick employee, spouse or child can make the plan uninsurable the next year.

Regarding the Department's concern that employment-based AHPs must be distinguished from commercial insurance type arrangements, the Proposed Regulation continues to impose commonality of interest and control requirements on AHPs. A trade association AHP's membership will have a commonality of interests that a commercial insurance type arrangement will not have. Further, the membership's control over the AHP will further distinguish it from a commercial insurance type arrangement. As such, we believe Subsection (d)(4) of proposed 29 C.F.R. § 2510.3-5(d) should be deleted from the Department's final rule.

Alternatively, if the Department does not remove Subsection (d)(4) from its final rule, it should nevertheless limit that subsection's applicability to groups or associations whose commonality of interest is limited to geographic location and who were formed for the sole purpose of sponsoring an AHP. Particularly when it comes to concern over discrimination on the basis of health status in the provision of group health plan coverage, we agree with other commenters that not all associations are created equal. As discussed above, the primary purpose of industry and trade associations is to protect their members' interests. We do not believe associations of employers whose only commonality is their geographic location, or those that form for the express purpose of selling insurance, have the same incentive to act in the interests of their member employers when offering AHP coverage. As such, if Subsection (d)(4) of proposed 29 C.F.R. § 2510.3-5(d) is retained in the Department's final rule, it should be made applicable only to groups or associations whose commonality of interest is based upon their geographic location (rather than trade, industry or line of business), or those formed for the primary purpose of sponsoring a group health plan.

Alternatively, if the Department does not limit applicability of Subsection (d)(4) as suggested above, then at a minimum, we encourage the Department to grandfather trade association AHPs that were in existence on January 5, 2018 with respect to the nondiscrimination provisions, such that they are not subject to the restrictions of Subsection (d)(4). This provision will adversely affect existing trade association AHPs that have operated in the best interests of their members for decades under the existing non-discrimination rules.

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The IBA Trust commends the Department's efforts on behalf of small businesses to expand access to affordable health coverage, and appreciates this opportunity to provide the Department with comments on the Proposed Regulation. We look forward to discussing these issues with you.

Sincerely,

Ogletree, Deakins, Nash, Smoak & Stewart, P.C.

Stephanie Alden Smithey

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