

March 6, 2018

Amy J. Turner
Director, Office of Health Plan Standards
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue NW (FP Building, Room N-5653)
Washington, DC 20210

**Re: Docket No. ESBA-2018-0001
Regulation Identifier No. 1210-AB85
Definition of Employer Under Section 3(5) of ERISA-Association Health Plans**

Dear Director Turner:

Pennsylvania Farm Bureau (PFB) appreciates this opportunity to provide comments to the U.S. Department of Labor's Employee Benefits Security Administration on the proposed association health plans rule, published in the Federal Register on January 5, 2018.

PFB is a general farm organization, made up of more than 62,000 members, providing legislative support, information, and services to Pennsylvania's farmers and rural families since 1950. Our organization includes 54 local organizations (county Farm Bureaus) that actively operate in 64 of Pennsylvania's 67 counties. PFB is a state affiliate of the American Farm Bureau Federation, an organization representing nearly six million member families throughout the United States. Many of those families—in Pennsylvania and in the rest of the United States—would be affected by the proposed rule.

Conceptually, we strongly support the Department's proposal to expand the use of and access to association health plans to combat rapidly rising health care costs. While, as noted below, we concur with many of the proposed rule's elements such as organizational formalities and the refined commonality standards, we offer some suggested changes to ensure the proposed rule fully accomplishes its principal goal of helping self-employed individuals and small businesses obtain affordable access to quality healthcare.

I. Increasing Eligibility and Use of Association Health Plans

Our organization was fortunate to offer an association health plan to its members for over 40 years. But in 2014, practical considerations by health insurance carriers, largely stemming from statutory and regulatory requirements brought about by the Affordable Care Act (Act), led to the termination of PFB's plan. Although many of the Act's goals were well intentioned, one undeniable result was that many small employers and self-employed individuals faced material financial pressures after the Act's passage. Given that roughly 87 percent of farms in the United States operate as sole proprietorships, farmers were, and are being, uniquely affected by the Act's passage. See 2012 Census of Agriculture, Table 67, Summary by Legal Status for Tax Purposes, at 146, available at <http://bit.ly/2BW6fPW> (providing that 1.8 million of the nation's 2.1 million farms are sole proprietors).

PFB's association health plan partially dampened financial hardships spawned by the Act, but after the termination of our plan, many of our members were faced with a choice of feeding their families or paying for health insurance expenses that they may never have used. When combined with the cyclical nature of the farming economy, which also affects prospective knowledge of qualifying for the Act's income subsidies, numerous farmers were faced with untenable decisions. In comments filed to the Department, one of our members remarked that for just him and his spouse, their annual health premiums and deductibles would have totaled \$35,000 before insurance began to cover them. Our member was forced to utilize a faith-based healthcare product, which provided nominal coverage and savings.

Unfortunately, the present situation has only worsened for farmers. Farm net income, and the dairy industry in particular, is at significant low points. While we have no illusions that the practical expansion of association health plans will serve as a cure-all to the farming industry's current economic environment, PFB strongly believes that, with proper controls to prevent fraudulent actors, association health plans can improve our members' access to affordable, quality health care. Bona fide organizations such as PFB know their members' needs and can tailor health plans and negotiate costs to improve access and affordability. Moreover, irrespective of visceral economics, long-standing, reputable organizations like PFB have built through decades of dedication a level of trust with their members, allowing them to persuade members to obtain healthcare beyond basic cost-benefit considerations. Indeed, as noted by an expert witness at a recent Senate subcommittee hearing on the proposed rule—trust matters. *See* Testimony of Mike Strum, Jan. 30, 2018, at 2, *available at* <http://bit.ly/2F0wGXX> (opining that “trust is an important factor in consumers' purchasing decisions [and that] AHP members may prefer to buy from their industry leaders ... whether or not the AHP is a more efficient funding vehicle”).

Nonetheless, as evinced by historical examples, we agree there is a potential for less scrupulous individuals and entities to exploit the expansion of association health plans to the detriment of plan participants. Consequently, we support the proposed rule's requirement for organizational formalities such as a governing body, bylaws, and varying levels of employer member control. A central theme presented in the Department's commentary to the proposed rule is enacting controls to ensure hollow-filled organizations don't sell plan enrollees a false bill of goods. We agree with that premise.

II. *Self-Employment Income Condition for Working Owners*

Although we firmly support the dual employer-employee treatment for working owners given the prevalence of farmers operating as sole proprietors, we note one potential issue the working owner criteria may bring about. Specifically, paragraph (e)(2)(ii) of the proposed rule requires self-employed individuals to earn income to qualify as a working owner eligible to join an association health plan. To the extent this provision sets an earned income standard as the term is defined in § 32(c)(2)(A)(ii) of the IRS Code (26 U.S.C.), defining earned income as “net earnings from self-employment income,” we think this condition would prove particularly problematic for many farmers. Cyclical professions such as farming often experience years or periods where net earnings are not gained. *See* John Newton, Ph.D., *Net Farm Income Projected to Drop to 12-Year Low*, *available at* <http://bit.ly/2GQmkGl> (observing median net farm income has averaged -\$1,569 since 1996). Therefore, a strict construction of the provision would force such individuals to either erroneously certify their compliance with the working owner definition or forego the benefit of joining plans that were specifically intended to help professions such as farming. *See* Exec. Order No. 13813, Oct. 12, 2017, at 1 (“Expanding access to [Association Health Plans] would provide more affordable health insurance options to many Americans, including hourly wage earners, farmers, and the employees of small businesses and entrepreneurs that fuel economic growth.”).

As a result, PFB suggests amending paragraph (e)(2)(ii) to allow the condition to be satisfied if a self-employed individual earns “gross” income from their trade or business. Additionally, while we recognize that the term “earned income” is also used in paragraph (e)(2)(iv), this provision is not a mandatory element, in contrast to paragraph (e)(2)(ii), since paragraph (e)(2)(iv) may also be satisfied by working a minimum of 30 hours per week or 120 hours per month. Given that farmers invariably meet the working-hours element, in our view, the use of earned income in the second instance is not as problematic.

III. *Conditions for Commonality of Interest*

Finally, we support the two commonality-of-interest standards set forth by the proposed rule. We agree that some flexibility to satisfy commonality is important, as opposed to current sub-regulatory guidance that has created an unnecessarily strict bar for commonality. However, we do note that some further guidance may be helpful as to the scope of the first commonality standard concerning employers in the “same trade, industry, line of business or profession.” Depending on how broad or narrow the Department interprets the provision could greatly impact an association’s potential employer member base. For example, if “industry” is adjudged broadly, employers involved with the agriculture industry could reasonably encompass farmers, farm nutrient planners, farm equipment sellers, and food market vendors. Construed narrowly, the provision may only encompass each of those professions separately. Thus, we think it would be helpful if the Department provided examples as to how broadly or narrowly it planned to interpret paragraph (c)(1).

Conclusion

If properly developed, bona fide association health plans can serve as a vital tool to help remedy many of the present problems with access to affordable healthcare, particularly for self-employed persons and small businesses. Organizations such as Farm Bureau stand ready with professional staff and industry knowledge to be a positive piece to the complicated puzzle that is healthcare. We support the Department’s effort to implement the proposed rule. Thank you for the opportunity to comment on the proposed rule.

Sincerely,



Joe D. Montenegro
Government Affairs Counsel