



March 6, 2018

Submitted Electronically

Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S Department of Labor
200 Constitution Avenue, N.W.
Room N-5655
Washington, D.C. 20210

Re: Definition of Employer Small Business Health Plans (RIN 1210-AB85)

To Whom It May Concern:

The Small Business Council of America (SBCA) appreciates this opportunity to comment on the above referenced proposed regulation published by the U.S. Department of Labor (“DOL” or the “Department”) on January 5, 2018, and the impact that the proposed regulations would have on small businesses and the health insurance options available to such businesses and their employees.

The SBCA fully supports the DOL’s goal of reducing regulatory burdens and helping reduce premiums and increase options in the small business health insurance marketplace. However, the SBCA does have concerns that the regulations, as proposed, could have the unintended result of simply redistributing, rather than actually reducing, health insurance costs and increasing costs for small employers offering coverage outside of an Association Health Plan (AHP).

Small businesses value their employees and the ability to offer health insurance is a critical tool for recruitment and retention. As the DOL pursues changes to AHPs the SBCA urges the DOL to avoid any changes that would make it more difficult or costly for small businesses to offer group health plans.

About the SBCA:

The SBCA is a national nonprofit organization that has represented the interests of privately-held and family-owned businesses on federal tax, health care and employee benefit matters since 1979. The SBCA, through its members, represents well over 100,000 enterprises

in retail, manufacturing and service industries, virtually all of which provide health insurance and retirement plans.

Areas of Primary Concerns:

- **The regulations should continue to prohibit associations formed solely for the purposes of offering a group health plan.**

Traditionally, AHPs were offered by associations that were formed with the larger purpose of promoting certain industries and sectors of the economy or engaging in other activities on behalf of their membership. However, the proposed regulations would change existing rules to allow associations to be formed for the sole purpose of offering group health insurance so long as the participating employers share a “commonality of interest” which might be as broad as an entire state or industry.

Allowing associations to be created solely to offer an AHP, is likely to motivate the formation of AHPs based, not on any common purpose or interest beyond offering health insurance, but rather on the risk profiles of the involved employers (and their employees) and the pursuit of lower premiums for the group. This is particularly true when considered in the context of the other provisions of the proposed rule loosening other requirements of AHPs.

Allowing the formation of AHPs comprised of employers with exclusively lower-risk employees will drive up the costs in the other parts of the small business insurance marketplace and simply shift, rather than drive down, costs.

In light of the above, the SBCA urges the DOL to retain the prohibition against AHPs being formed solely to offer group health coverage (unless it can be shown that no other association is able and willing to offer a health plan) and instead, encourage AHPs offered by associations formed around another legitimate broader purpose or common interest. At a minimum, the regulations should impose a minimum period (we would support 3 years) over which the association must have been truly operational before it can form an AHP. Finally, the regulations should maintain the prohibition against insurance carriers forming AHPs and expand that prohibition to other entities with direct conflicts of interest, such as health systems.

- **The DOL should be cautious in its expansion of rating tools and the extent to which age and gender can be considered in setting rates.**

The SBCA supports the goal, embodied in the proposed regulations, of ensuring that employees’ health statuses or past claims are not used to limit which employers will be permitted to join an association that has formed an AHP. However, the SBCA is concerned by the expansion of the other rating tools that the proposed regulations would allow to be used in the small group marketplace – which may be used as a proxy for otherwise prohibited discriminatory factors.

The proposed regulations appear to leave the door open for associations (including those created solely for the purpose of forming an AHP) to use their membership criteria to game the

system and exploit the rating rules to create the most favorable pool of businesses possible in the AHP.

Because AHPs are intended to help expand options for small employers, it is essential that the regulations maintain parity across the small group health insurance marketplace by applying the same rating rules to AHPs so as to ensure that certain AHPs aren't increasing costs for the larger pool by simply skirting risk.

- **The DOL should adopt its proposal to allow working owners to be eligible to participate in an AHP provided that the associations that can form an AHP are limited as set forth above.**

If the new rules allow associations to be formed on the spot solely for the purposes of forming an AHP and working owners are permitted to participate in AHPs, this could motivate those associations formed solely to sponsor AHPs to seek out only those self-employed owners who will help their risk profile while rejecting those who would hurt their risk profile.

The SBCA strongly supports the proposal to allow working owners to participate in AHPs as long as the associations that may offer AHPs are limited to traditional associations, so that the risk factors of the individual working owner cannot be used in determining his or her admission into the association. If this is to be the case, the SBCA urges the DOL to develop a simple test for determining which business owners should be able to be eligible to participate in an AHP both on the grounds that they are legitimately active in their business and they aren't being let into the association solely based on their risk factors.

- **The DOL should confirm that states still have the authority to regulate self-insured AHPs and multi-state AHPs to the extent the employer is in the state.**

As was previously seen in the context of Multi-Employer Welfare Arrangements (MEWA) before state oversights were enacted, significant issues related to insolvency and non-payment of claims can arise with respect to self-insured plans. To prevent against the problems that arise from these self-insured plans, while recognizing the limits of the DOL's ability to monitor the issue, the SBCA urges the DOL to confirm in its final rules that the states continue to have the authority to regulate self-insured AHPs and MEWAs but clarify that, as to multi-state AHPs the state rules will govern only as to employers in that state.

Conclusion:

In order to avoid significant negative impacts on the small businesses that wish to offer group health insurance outside an AHP and on businesses and individuals with less favorable risk profiles, the proposed rule should be amended to maintain limits on which associations can offer group health coverage. As articulated above, the rules, as proposed, will leave an opening for AHPs to engage in risk-shifting that will drive down costs for those AHPs but drive up the cost for other small business group health plans and individuals. The SBCA urges the Department to take all necessary and appropriate steps to ensure that its rules make it easier and more affordable for small businesses across the board to offer group health insurance, and do not

unnecessarily burden those small businesses that do not wish to participate, or, because of risk factors, will not be accepted, in an AHP

On behalf of our members, we appreciate this opportunity to comment and look forward to working with the Department to working together to improve the health insurance marketplace for small businesses

Sincerely,



Paula Calimafde, Chair
301-951-9325
calimafd@paleyrothman.com