

March 6, 2018

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: Vigilant, Vigilant Manufacturers' Trust and Vigilant Group Benefits Trust  
Comments to Proposed Rule

To Whom It May Concern:

The Vigilant and its association sponsored health plans in Washington State and Oregon, the Vigilant Manufacturers' Trust and Vigilant Group Benefits Trust, respectfully submit these comments to the U.S. Department of Labor's Proposed Rule entitled "Definition of Employer Under Section 3(5) of ERISA-Association Health Plans." The Proposed Rule concerns when an association is considered an employer under Section 3(5) of the Employee Retirement Income Security Act ("ERISA") for the purpose of sponsoring an association health plan ("AHP").

Vigilant, Vigilant Manufacturers' Trust ("VMT") and Vigilant Group Benefits Trust ("VGBT") appreciate the Department of Labor's acknowledgment that AHPs offer an important alternative for employers seeking health plan coverage. This letter provides the Vigilant, VMT and VGBT's statement of interest in the Proposed Rule. This letter also provides substantive comments and recommended changes to the Proposed Rule.

**1) Interest in the Proposed Regulations**

**a) Vigilant**

Vigilant was formed in 1960 as a 501(c)(6) non-profit corporation headquartered in Oregon. Vigilant was originally formed as the Timber Operators Council ("TOC") by consolidating four smaller west coast employers associations in the wood products industry into a consolidated industry association. Vigilant (then

TOC) was formed for the purpose of representing its member employers in multiemployer collective bargaining with the two major timber industry labor organizations. The consolidation of four associations into one was to strengthen the coordination among employers and improve the effectiveness of that bargaining representation. As restated in its 2009 Amended and Restated Articles of Incorporation, Vigilant's objects and purposes are:

1. To engage in the study of labor management relations, employer-employee relations, public relations, safety, employee communications, collective bargaining, labor contract administration and procedures of management problems and related subjects;
2. To engage in research relating to industry economics and all subject directly and indirectly related thereto;
3. To conduct educational and training courses in the field of labor management relations, labor contract administration and procedures, collective bargaining, collective bargaining procedures, safety, employee communications and public relations and to implement said courses by providing personnel training in said fields to consult with and to advise members of the corporation on said matters;
4. To encourage good faith collective bargaining and to engage in collective bargaining on behalf of any one or more of its members to the extent such member or members authorize it so to do;
5. To work with federal and state governmental agencies having jurisdiction of labor management relations, safety and other related matters affecting safety, wages, hours of employment and conditions of employment and collective bargaining; and
6. To engage in such other activities and fields directly or indirectly related to the foregoing objects and purposes, deemed by the Board of Directors to be reasonably necessary to accomplish and implement the foregoing purposes.

Vigilant has two classes of membership: Manufacturing and Non-Manufacturing members. Manufacturing members constitute the majority of Vigilant's membership (84%) and constitute the majority of Vigilant's Board of Directors. Certain Vigilant programs, such as its trust-sponsored group welfare plans, are limited to its Manufacturing members.

Vigilant is controlled by its Manufacturing members. This is because Vigilant's By-Laws expressly required that a majority of its Board of Directors consist of Manufacturing members. Currently 11 of the 12 Board members are Manufacturing members. The Executive Committee of the Board of Directors is responsible for nominating all members of the Board of Directors and ensuring that the majority of the Board of Directors consists of Manufacturing members.

**b) Vigilant Manufacturers' Trust and Vigilant Group Benefits Trust**

Vigilant currently sponsors two group welfare benefit trusts and related plans – VMT and VGBT. VMT is for Vigilant manufacturing members in Washington State and VGBT is for Vigilant manufacturing members in Oregon and Clark County Washington.

Vigilant's first trust sponsored group welfare plan (VGBT) was originally established in 1961 as the TOC Health and Welfare Trust. The plan was established for the purpose of providing a health benefit plan to members' non-collectively bargained employees. Members' collectively bargained employees were typically covered under multiemployer group health plans (Taft-Hartley health trusts), one of which Vigilant also co-sponsors.

VMT and VGBT each file an annual Form 5500 and M-1.

As an organization that has continuously and successfully provided cost-effective health benefits to member employers' employees and their families for nearly 57 years through its association health plans, as others have come and gone, we have a keen awareness of what it takes to do provide sustainable value through this unique health insurance distribution model. We have taken great care to assure that the employer-members we serve control the governance of our association and our plans and that we effectively manage the underlying risk of the plan through equitable and effective underwriting to avoid the inevitable death spiral that results without it. Our comments below are based upon our extensive experience in effective Association Health Plan sponsorship and our concern that the regulatory changes under consideration must sustain the viability of what is working now as they seek to stimulate replication of that success for more employers and their employees.

**2) Comments and Recommendations on the Proposed Rule**

**a) The Rules Should Encourage Innovation in Benefit Offerings and Underwriting.**

Vigilant currently offers its AHPs in Washington State (VMT) and Oregon State (VGBT) VMT contracts with Premera Blue Cross to provide health care benefits to its members. VGBT contracts with Regence Blue Cross Blue Shield in Oregon. Both Trusts also contract with other vendors to provide dental, vision, life and accidental death and dismemberment benefits.

Both Washington and Oregon allow AHP sponsored plans to use employer-specific claims experience as one of several factors in setting renewal pricing. This has occurred for decades without negative consequences to the market. Both the AHP and small group markets in Washington and Oregon are strong and engage in healthy competition. The reality of this competition is that some employers will seek the lowest priced coverage option regardless of whether it is in the small group community market or the AHP market. However, price is not the exclusive factor that employers consider. Some employers prefer plans with generous benefits, others prefer plans with strong networks and customer service, and still others prefer AHPs because of the association's mission and ancillary benefits.

With all of these various interests in play, it is important to provide meaningful alternatives within the market place. The AHP market provides these alternatives by: 1) using economies of scale to negotiate better deals for participating employers; 2) providing unique and industry specific plan and product offerings; and 3) facilitating benefits administration for participating employers through online eligibility management, consolidated billing, COBRA administration, employer required communication/notices and access to ancillary benefits (vision, dental, life and accidental death and dismemberment).

The proposed nondiscrimination rule unfairly disadvantages fully-insured AHPs because it removes the most important tool for providing a meaningful difference in the underwriting available to other small employers. If the rule is adopted in its current form, insurance carriers will cease to be innovative and flexible in an effort to reduce the risk of negative claims experience. The primary objective of these regulatory changes to providing more cost-effective health insurance alternatives for employers (particularly small employers) by allowing them to purchase collectively through AHPs will be thwarted if AHP underwriting capabilities are limited as currently proposed.

Additionally, Vigilant, VMT and VGBT provides coverage to both small and larger employers. This is because many manufacturing employers have more than 51 employees. Vigilant is deeply concerned that with the proposed rule Vigilant will not have access to employers with 51 or more employees. This is because VMT and VGBT's insurance carriers will not agree to underwrite large employers without claims experience. This will be extremely detrimental to Vigilant and the viability of its AHPs.

### **RECOMMENDATION**

The rule should eliminate the propose nondiscrimination provision and allow experience based underwriting at the employer level.

#### **b) The Rules Should Distinguish Between Self-Funded and Fully Insured AHPs.**

We think it is important to distinguish between self-funded AHPs and fully insured AHPs entities in the final rule. Self-funded AHPs have historically presented the most significant problems in the market. Fully insured AHPs which are back by licensed insurance companies, which are subject to significant review and oversight by the state insurance commissioners and the U.S. Department of Health and Human Services ("HHS").

### **RECOMMENDATION**

The rules should acknowledge the important statutory and regulatory requirements that are already in place for fully insured AHPs. Except for the definition of employer and requested clarifications concerning preemption addressed below, all other provisions of the rule should be limited to self-funded AHPs.

#### **c) The Rules Should Clarify that ERISA Preempts State Laws that Limit Fully Insured or Self-Funded AHPs From Operating.**

ERISA Section 514 states that ERISA shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. As mentioned previously, state regulation of fully-insured AHPs is saved from preemption to the extent the state is establishing standards requiring the maintenance of specified levels of reserves and specified levels of contributions.

Although ERISA appears to provide some protection to AHPs by limiting a state's ability to directly regulate an AHP, insurance commissioners regulate AHPs indirectly by imposing stricter requirements on insurance plans offering coverage to AHPs than they would impose on those same insurance carriers offering coverage in the larger or small group markets. Indeed, there is no current guidance that restricts a state from prohibiting an AHP from self-funding, prohibiting an AHP from obtaining a license, imposing additional and often burdensome filing requirements to demonstrate satisfaction of federal law, or restricting underwriting which is otherwise available in the large group market.

### **RECOMMENDATION**

The Rules should clarify that ERISA preempts state laws which impose requirements on insurance carriers offering coverage to AHPs which are more restrictive than the requirements which would apply if the insurance carrier is offering coverage to other employers purchasing insurance coverage in the market. Additionally, to the extent legally permissible, the Rules should clarify that state laws which prohibit AHPs from sponsoring a health plan or from self-funding are preempted.

#### **d) Most Importantly, the Rules Should Protect What Is Already Working.**

Vigilant, VMT and VGBT are concerned that the proposed regulations may open the Washington State and Oregon State AHP markets to health insurers and human resource service companies, payroll providers or other profit-seeking organizations masquerading as associations for the purpose of selling health insurance. Vigilant, VMT and VGBT believe that it is important that AHPs be limited to membership-based organizations, which are tax exempt under Internal Revenue Code Section 501(c), and which are formed at least in part for a purpose other than providing health benefits to its members. These requirements would recognize the importance of the AHP, its relationship to its members and that these plans are governed in the best interest of those they are created to serve.

### **RECOMMENDATION**

We recommend that the DOL bona fide test should be modified, not abandoned – AHPs should not be limited to an industry; however, AHPs should be limited to membership-based organizations, which are tax exempt under Internal Revenue Code Section 501(c), and which are not formed solely for the purpose of providing health benefits.

**e) Provide Existing AHPs with Sufficient Time to Comply with the Final Rules**

Vigilant, VMT and VGBT are concerned that the final regulations will require significant changes to the trusts' current operation and their benefit offerings. Because insurance contracts are on a 12-month basis, any changes that will impact underwriting or benefit offerings could have a significant negative impact if the changes occur mid-year.

**RECOMMENDATION**

We recommend that the DOL delay the effective date of the final rules to provide insured AHPs with sufficient time to implement any changes required by the final rules.

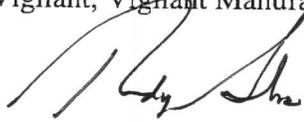
**3) Summary of Recommendations**

- i) The rule should eliminate the proposed nondiscrimination provision and allow experience based underwriting at the employer level.
- ii) Except for the definition of employer and requested clarifications concerning preemption addressed below, all other provisions of the rule should be limited to self-funded AHPs.
- iii) The Rules should clarify that ERISA preempts state laws which impose requirements on insurance carriers offering coverage to AHPs which are more restrictive than the requirements which would apply if the insurance carrier is offering coverage to other employers purchasing insurance coverage in the market. Additionally, to the extent legally permissible, the Rules should clarify that state laws which prohibit AHPs from sponsoring a health plan or from self-funding are preempted.
- iv) AHPs should be limited to membership-based organizations, which are tax exempt under Internal Revenue Code Section 501(c), and which are not formed solely for the purpose of providing health benefits.
- v) The DOL should delay the effective date of the final rules to provide insured AHPs with sufficient time to implement any changes required by the final rules.

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Very truly yours,

Vigilant, Vigilant Manufacturers' Trust and Vigilant Group Benefits Trust

A handwritten signature in black ink, appearing to read "Rodger Glos". The signature is fluid and cursive, with a large initial "R" and "G".

Rodger Glos, Chairman, Group Benefit Plans and Trustee