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Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW, Room N-5609
Washington, DC 20210
Attention: Definition of Employer—Small Business Health Plans

**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 Independent Electrical Contractors (“IEC”) 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”).¹

Established in 1957, IEC is a trade association with over 50 chapters, representing 3,400 member companies that employ more than 80,000 electrical and systems workers throughout the United States. Headquartered in Alexandria, Va., IEC is the nation’s premier trade association representing America’s independent electrical and systems contractors. IEC aggressively works with the industry to establish a competitive environment for the merit shop – a philosophy that promotes the concept of free enterprise, open competition and economic opportunity for all.

IEC also educates 11,000 electricians and systems professionals each year through world-class apprenticeship programs. IEC member companies handle over \$8.5B in gross revenue annually and include many of the premier firms in the industry.

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

¹ 83 Fed. Reg. 4, 614 (January 5, 2018).

The mission of IEC is to enhance the success of independent electrical contractors by providing opportunities to develop and retain a professional workforce through educational programs, communicating with government, promoting ethical business practices, and providing leadership for the electrical industry. IEC is committed to providing its member companies with innovative education, products and services that enhance productivity, profitability and competitiveness through IEC chapters and strategic partnerships.

IEC's Position

IEC recognizes that expanding access to affordable health coverage among small employers and self-employed individuals support its mission, and IEC strongly supports the Department's proposal to expand access to health coverage by allowing more employers to form association health plans (AHPs). The majority of IEC's member companies are small businesses with fewer than 50 employees, and a significant number include working owners. IEC's member companies compete for talent with businesses whose employees are covered by collectively bargained plans, which traditionally offer rich health benefits. The Proposed Regulation will significantly enhance IEC member businesses' ability to attract and retain talent by expanding their access to valuable and affordable health benefit plans.

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 IEC 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 companies, 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 aspects, the Proposed Regulation unnecessarily restricts the ability of industry associations like the IEC to expand access to AHPs to small businesses and working owners.

IEC'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 IEC 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 appreciate the Department's consideration of the following recommended changes to the Proposed Regulation:

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

I. 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 nondiscrimination rules found at 29 C.F.R. § 2590.702, which limit how group health plans can vary eligibility, premiums, and contributions between groups of similarly situated individuals.

According to Department commentary found 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."³ However, IEC is concerned that the Proposed Regulation's nondiscrimination rules will unnecessarily limit small employers' access to AHPs.

Subsection (4) of proposed 29 C.F.R. § 2510.3-5(d) 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*).⁴ We believe that proposed Subsection (d)(4) will dramatically hinder the ability of AHPs 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 and by the existing nondiscrimination rules already applicable to AHPs under 29 C.F.R. § 2590.702.

Regarding the Department's concern that employment-based AHPs must be distinguished from commercial insurance type arrangements, the Proposed Regulation's continue to impose commonality of interest and control requirements on AHPs. In order to satisfy these requirements, the AHP will be distinct from commercial insurance type arrangements. An AHP's membership will have a commonality that a commercial insurance type arrangement will not have. Further, the membership's control over the organization and its group health plan 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.

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 who 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

³ 83 Fed. Reg. at 623.

⁴ 83 Fed. Reg. 635-636.

to groups or associations whose commonality of interest is based upon their geographic location (rather than trade, industry or line of business), or those who were formed for the primary purpose of sponsoring a group health plan.

If the Department does not limit applicability of this subsection as suggested above, then at a minimum, we encourage the Department to grandfather 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).

II. Barriers to coverage of working owners should be removed.

We strongly support the Department's efforts to expand access to AHPs to working owners without common law employees; however, we believe one aspect of the Proposed Regulation imposes unnecessary barriers to expanding this access. Proposed 29 C.F.R. §2510.3-5(e)(2) of the Proposed Regulation defines the term "working owner" and sets forth the requirements a working owner must satisfy to be eligible to participate in an AHP as both an employer and an employee. The preamble to the Proposed Regulation explains that these requirements are intended to "ensure that a legitimate trade or business exists" and that without such criteria, "the regulation could effectively eliminate the statutory distinction between offering and maintaining employment-based ERISA-covered plans *** and the mere marketing of insurance to individuals outside the employment context on the other." We agree that the Department's concern is valid. However, one of the requirements to be a "working owner" does not in any way support the Department's aim in this regard, and therefore imposes an unnecessary barrier to many working owners' ability to participate in AHP coverage. Proposed 29 C.F.R. §2510.3-5(e)(2)(iii) provides that a working owner must not be "eligible to participate in any subsidized group health plan maintained by any other employer of the individual or of the spouse of the individual." This Subsection (e)(2)(iii) should be removed from the final rule. While it may, as the Department points out, align with the conditions for self-employed individuals to deduct the cost of health insurance under Section 162(l) of the Internal Revenue Code (the "Code"), whether a working owner is eligible for other employer-sponsored coverage has absolutely no bearing on whether that working owner is engaged in a "legitimate trade or business." The other criteria set forth in Subsection (e)(2) of proposed 29 C.F.R. §2510.3-5 adequately address that concern without unnecessarily restricting access to AHPs by working owners.

If the Department retains Subsection (e)(2)(iii) of proposed 29 C.F.R. §2510.3-5 despite the above, then that subsection should be revised to specifically define "subsidized" group health plan coverage to ensure a minimum level of benefits must be available to the working owner before he or she is disqualified from participating in an AHP. We propose the Department give the term "subsidized" its ordinary meaning, such that "subsidized group health plan coverage under a group health plan sponsored by any other employer" means group health plan coverage for which the other employer pays a substantial portion of the premium. Specifically, we suggest that to constitute "subsidized" coverage, the other coverage must be minimum essential coverage, offering minimum value (as those terms are defined under Section 5000A(f) of the Code and Treasury Regulation § 1.36B-6, respectively), for which the other employer pays at least 50 percent of the premium. This would ensure that if Subsection (e)(2)(iii) of proposed 29 C.F.R. §2510.3-5 remains in the final rule, then it will not unnecessarily disqualify working

owners from AHP coverage unless they have a reasonably affordable alternative coverage option available through another employer.

III. The control requirement should contemplate a broader array of governance structures.

In order to constitute a “bona fide group or association of employers,” 29 C.F.R. § 2510.3-5(b)(3) of the Proposed Regulation would require the group or association of employers to have a formal organizational structure with a “governing body” and bylaws or other similar indications of formality. As noted in the comment submitted by the National Federation of Independent Business (NFIB), dated January 23, 2018, the term “governing body” implies an authority composed of multiple individuals. To account for the variety of different governance structures a group or association of employers might employ, we agree with the NFIB that the term “governing body” should be replaced with the term “governing authority.” Such a clarification is, we believe, consistent with the Department’s intent to ensure that the group or association is a genuine organization with the organizational structure necessary to act in the interest of its constituent members.

IV. Additional guidance is needed regarding the degree of control that member employers must exercise over the group or association.

IEC also encourages the Department to provide more detailed guidance that addresses the degree of control over the functions and activities of the group or association that is necessary to constitute a bona fide group or association of employers, as well as the types of activities or other criteria that would be sufficient to demonstrate the necessary degree of control.

V. Additional guidance is needed on the commonality of interest test as applied to employers in ancillary trades or industries.

Subsection (c) of the Proposed Regulation sets forth criteria through which a group of employers may establish sufficient commonality of interest to be deemed a “bona fide” group or association of employers that can establish an AHP. It would be helpful if the Department would provide additional guidance regarding the extent to which employers in ancillary or supporting roles to a particular trade, industry, or line of business would be deemed by the Department to share a commonality of interest with employers in that primary trade, industry, or line of business. For example, in the Department’s view, would a supplier of electrical materials be considered to have sufficient commonality of interests to participate in an AHP alongside IEC’s electrical contractor members? What facts and circumstances will determine whether employers providing ancillary goods or services share a commonality of interest with the primary industry of a group or association of employers?

VI. The Department should exempt non-fully insured MEWAs from state regulation.

The Department has requested comments on the potential merits of an exemption for non-fully insured MEWAs from state insurance regulation pursuant to the Department’s authority under Section 514(b)(6)(B) of ERISA and the potential for such an exemption to promote healthcare consumer choice and competition across state lines. We strongly support such an exemption. For the same reasons discussed above, we believe that in the case of groups or associations that are formed around a shared trade, industry, or line of business, and who were not formed for the sole purpose of sponsoring a group health plan, the association’s interests are sufficiently aligned with those of their constituent members that the types of abuses perpetrated

by MEWA operators in the past are much less likely to occur. If the Department were to grant such an exemption, non-fully insured MEWAs would remain subject to state insurance laws that apply to fully insured MEWAs under ERISA Section 514(b)(6)(A), and they are, of course, also subject to the fiduciary and other stringent protective requirements of ERISA. The additional layer of state by state regulation that currently applies to non-fully insured MEWAs is an impediment to the kind of expanded availability and access to health coverage contemplated by Executive Order 13813, particularly with regard to AHPs, which are MEWAs, that operate in multiple states—a specific area of focus of Executive Order 13813.

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IEC commends the Department's efforts on behalf of small businesses and self-employed individuals to expand access to affordable health coverage, and appreciate this opportunity to provide the Department with comments on the Proposed Regulation. We look forward to discussing these issues with you.

Sincerely,

Jason E. Todd
Vice Preside, Government Affairs
Independent Electrical Contractors