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Office of Regulations and Interpretations, Employee Benefits Security Administration
Attn: RIN 1210-AB85
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

RE: Comments on Proposed Regulations to Facilitate the Formation of Small Business Health Plans

Greetings:

Land O'Lakes, Inc. ("Land O'Lakes" or the "Company") submits these comments in response to the Notice of Proposed Rulemaking ("NPRM"), clarifying the definition of "employer" under Section 3(5) of the Employee Retirement Income Security Act ("ERISA") for purposes of establishing a "Small Business Health Plan" ("SBHP").

SUMMARY

As discussed in greater detail below, Land O'Lakes submits the following comments:

1. Land O'Lakes supports allowing self-employed individuals with no employees (referred to as "working owners," which includes "working owner-farmers") to participate in "group health plan" coverage offered through an SBHP.
2. Land O'Lakes supports the proposed modification to the "commonality of interest" test, which would eliminate the geographical limitation for employers and working owners "related" by a common industry.
3. Land O'Lakes supports the development of a "class exemption" that would exempt a self-insured SBHP from the non-solvency requirements of State "multiple employer welfare arrangement" ("MEWA") laws.
4. A self-insured SBHP should be permitted to develop different premiums for different group members based on the member group's "health claims experience," with special consideration given to experience-rating very small groups and working owners.

DISCUSSION

I. Background on Land O'Lakes and the Types of Health Coverage Offered to Cooperative Members, Farmers, and their Dependents

Land O'Lakes, one of America's premier agribusiness and food companies, is a member-owned cooperative with industry-leading operations that span the spectrum from agricultural production to consumer foods. With 2016 annual sales of \$13.2 billion, Land O'Lakes is one of the nation's largest cooperatives, ranking 209 on the Fortune 500. Building on a legacy of more than 96 years of operation, Land O'Lakes today maintains some of the most respected brands in agribusiness and food production, including LAND O LAKES® Dairy Foods, Purina Animal Nutrition and WinField® United. The Company does business in all 50 states and more than 60 countries. The Company touches more than 50% of the harvested acreage in the United States, and has a heavy base of farmers in both the Midwest and Pennsylvania. Land O'Lakes corporate headquarters are in Arden Hills, Minnesota. The Company and its affiliates have approximately 10,000 employees.

In addition to various employee benefits offered to its employees, the Company sponsors two distinct health plans for its members. The first is a fully-insured health plan covering employees of certain agricultural cooperatives that are members of Land O'Lakes. The second is a self-insured health plan for working owner-farmers in Minnesota who are members of certain agricultural cooperatives.

A. The Land O'Lakes Fully-Insured Group Health Plan for Employees of Agricultural Cooperatives

The Company's fully-insured plan (officially named the "Land O'Lakes, Inc. Member Cooperative Health Plan," but referred to as the "Land O'Lakes fully-insured plan") is a "group health plan" (as defined under ERISA), and is considered a "large group" plan by the insurance carrier underwriting the coverage. The plan covers more than 5,700 employees (and 6,300 of their dependents) of 51 participating Land O'Lakes member cooperatives located in 12 different States.¹ A cooperative is a membership-run organization governed by a Board elected by cooperative members. The Land O'Lakes fully-insured plan is governed by a Board of individuals elected by the participating member cooperatives.

The insurance contract for the Land O'Lakes fully-insured plan is "situated" in the State of Minnesota, which generally means that the plan is subject to Minnesota's benefits mandates and other health insurance regulations, even for the health coverage offered in "non-situs" States. The

¹ Arkansas, Iowa, Illinois, Kansas, Louisiana, Minnesota, Montana, Nebraska, North Dakota, South Dakota, Washington, and Wisconsin.

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premiums for each of the 51 participating Land O'Lakes cooperatives are based on that cooperative's "health claims experience." In other words, each cooperative is "experience-rated." All employees of a particular cooperative are charged the same premium as other employees of that cooperative with the same coverage.

B. The Land O'Lakes Self-Insured Group Health Plan for Minnesota Working Owner-Farmers

Land O'Lakes also sponsors a self-insured health plan that provides coverage to certain working owner-farmers in Minnesota (officially known as the "Minnesota Co-Op Members Health Plan" but referred to as the "Land O'Lakes self-insured plan"). Participants in the Land O'Lakes self-insured plan include 320 working owner-farmers (and 420 dependents) who are members of agricultural cooperatives. The Land O'Lakes self-insured health plan is established and maintained under a Minnesota statute.² According to the statute, the plan is exempt from Minnesota's "benefit mandates," but only if the plan complies with Federal law, including ERISA and the Affordable Care Act ("ACA").³ The Land O'Lakes self-insured plan is governed by a Board elected by plan participants. The Board is responsible for administering the plan through a Trust and for ensuring compliance with Federal and State laws. Premiums for the participants and their dependents vary by age and geography, but premiums are not developed based on the health claims experience of the working owner-farmers.

II. Support for Allowing Working Owner-Farmers To Participate in an SBHP

Land O'Lakes strongly supports the Department of Labor's (the "Department") decision to allow working owners – which includes working owner-farmers – to participate in group health plan coverage through an SBHP. We appreciate the Department's efforts to expand access to affordable and quality health care options for working owner-farmers, and we thank the Department for seeking to remove the regulatory barriers that have long-limited our Company's ability to provide working owner-farmers across the country the freedom to choose a health plan that best fits their needs. As a top priority for Land O'Lakes, we urge the Department to finalize this proposal.

A. Land O'Lakes Currently Offers Comprehensive Self-Insured Health Coverage to Working Owner-Farmers that Complies with ERISA's and the ACA's Consumer Protections

A Minnesota statute allows Land O'Lakes to provide health coverage through the Land O'Lakes self-insured plan to working owner-farmers of certain Land O'Lakes cooperatives and their dependents. While the plan, which covers no employees, is not technically a "group health plan"

² Minnesota Statutes Chapter 62H.18.

³ Minnesota Statutes Chapter 62H.18, Subd.9.

as defined by ERISA, the plan provides a comprehensive level of coverage in accordance with ERISA's and the ACA's consumer protections. For example, under the Land O'Lakes self-insured plan:

1. A participant cannot be denied coverage because of a pre-existing condition;
2. A participant has no-cost coverage for certain preventive services;
3. There are no annual and lifetime limits imposed on "essential health benefits" covered under the plan;
4. A participant's dependent child can be covered up to age 26;
5. A participant enjoys free access to emergency care; and
6. Coverage cannot be rescinded except for fraud.

ERISA imposes specific disclosure requirements and fiduciary responsibilities, requiring Board members to act in the best interest of the plan participants. Participants have the right to sue plan fiduciaries if there is wrong-doing. The plan has detailed procedures for filing health claims and rigorous internal and external appeals processes.

B. Land O'Lakes Would Offer Comprehensive Self-Insured Health Coverage to Working Owner-Farmers Across the Country

Because the Land O'Lakes self-insured health plan is maintained pursuant to a Minnesota statute, the Company has been unable to extend this health coverage outside the state, despite its interest in offering similar health benefits to working owner-farmers of certain member cooperatives in other states. If working owners are permitted to participate in an SBHP, as proposed by the Department, Land O'Lakes *would* be able to expand our self-insured health plan coverage to working owner-farmers across the country.

We believe that the Land O'Lakes self-insured health plan is a model of the type of health coverage that would be made available to employees and working owners through an SBHP, as our plan offers a comprehensive level of coverage that complies with ERISA's and the ACA's consumer protections. If given the opportunity, Land O'Lakes would offer this same type of comprehensive coverage to working owner-farmers of certain member cooperatives (and their dependents) in states other than Minnesota.

Critics of the Department's proposal to allow SBHPs to offer fully-insured "large group" or self-insured SBHP health coverage to working owners and employees in multiple states may argue that such arrangements would offer inadequate coverage, especially because these plans are not subject to the ACA's "essential health benefits," actuarial value," adjusted community premium rating, and single-risk pool requirements. The Company believes, however, that these concerns are misplaced because of the ERISA and ACA consumer protections discussed above, with which the

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Land O'Lakes self-insured health plan, like *all* self-insured SBHPs (as ERISA-covered group health plans), *must* comply.

III. Support for Flexibility in Forming an SBHP through the Proposed Modification to the “Commonality of Interest” Test

A. The “Commonality of Interest” Test and the Proposed Modification

According to the NPRM, to establish an SBHP, a group of employers and working owners must be considered a “bona fide group or association of employers” for purposes of ERISA. To be considered “bona fide,” the group must satisfy the (1) “commonality of interest” and (2) “control” tests. According to judicial opinions and existing Department guidance, a group of employers would *not* satisfy the “commonality of interest” test unless the employer members are (1) “related” (i.e., they are in the same industry) *and* (2) located in the same state.⁴

In the NPRM, the Department proposes that a group would meet the “commonality of interest” test if the employers (and working owners) are (1) in the same industry, line of business or profession *or* (2) have a principal place of business in a single state or in a single metropolitan area, which may span more than one state.

The Department proposes to eliminate the geographical limitation for “related” employers and working owners, which would allow a national trade association or member-run organization (like a cooperative) to establish an SBHP and offer health coverage to its members nationwide, or on a regional basis. Land O'Lakes strongly supports this modification and urges the Department to finalize this proposal.

B. Land O'Lakes Could Merge Its Fully-Insured and Self-Insured Plans to Cover Both Cooperative Employees and Worker Owner-Farmers Across the Country

Once this proposal is finalized, the 51 cooperatives currently participating in the Land O'Lakes fully-insured plan and the working owner-farmers in the Land O'Lakes self-insured health plan could be covered by a single SBHP. This new SBHP could provide coverage to all of the 6,020 participants (and 6,720 dependents) currently covered under the two health plans. The greater plan participation would provide greater financial security and reduce administrative costs.

⁴ *Gruber v. Hubard Bert Karle Webber, Inc.*, 159 F.3d 780 (3rd Cir. 1998) (citing *Steen v. John Hancock Mutual Life Ins.*, 106 F.3d 904 (9th Cir. 1997)); *National Ben. Administrators, Inc., National Business Ass'n By and Through v. Morgan*, 770 F. Supp. 1169 (W.D.KY 1991); *see also*, DOL Adv. Op. 2012-04A (May 25, 2012), DOL Adv. Op. 2005-24A (Dec. 30, 2005), DOL Adv. Op. 2005-25A (Dec. 30, 2005), DOL Adv. Op. 2003-17A (Dec. 12, 2003).

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The new SBHP could also offer coverage to additional agricultural workers and working owner-farmers because those individuals would, as participating employer and working owner-farmer cooperative members, clearly be “related,” thus satisfying the proposed “commonality of interest” requirement. With no geographical constraint, the new SBHP could offer health coverage to employees and working owner-farmers in all 50 states, or on a regional basis.

The Company envisions that this new SBHP would be self-insured, like the Land O’Lakes self-insured plan in Minnesota, and would be governed by a Board elected by plan participants. The members would have the requisite “control” over the plan, which is a critical component of the definition of a “bona fide group or association of employers,” as well as a critical factor in ensuring that the members are “acting in the best interest” of the SBHP’s participants.

IV. The Need for a Class Exemption from the Non-Solvency Requirements of State MEWA Laws

A. Self-Insured SBHPs Must Comply with a Patchwork of Legal Requirements and Licensing Practices

A self-insured SBHP is by definition a MEWA. ERISA gives states the exclusive authority to impose any state insurance law requirement on self-insured MEWAs. Over the years, states have enacted their own state MEWA laws with varying degrees of regulation. Some states prohibit self-insured MEWAs altogether. This has created a “patchwork” set of requirements that a self-insured SBHP must meet if a member-run organization (like a cooperative) wants to offer self-insured health coverage to employees and working owners located in multiple States.

A self-insured, multi-state SBHP would, in those states that permit it at all, have to satisfy the most stringent coverage and financial requirements of any of the states in which it offers coverage. Unfortunately, the multiplicity of state insurance laws may preclude establishing a single self-insured SBHP. While it would not be impossible for an SBHP to comply with the most stringent state solvency requirements, the cost and time associated with complying with the patchwork of other regulations and licensing rules will be prohibitive. For this reason, the Company urges the Department to issue a class exemption that would shield a self-insured SBHP from the non-solvency requirements of state MEWAs, provided specified Federal requirements are satisfied.

B. A Class Exemption Would Provide Greater Regulatory Uniformity

A principal purpose of ERISA was to avoid the multiplicity of state regulations and permit nationally uniform administration of employee benefit plans. A class exemption would provide a level of uniformity that would allow self-insured SBHPs to offer health coverage in multiple states free from the burden of complying with regulations that differ in each-state. Land O’Lakes is not

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suggesting that self-insured SBHPs should be free of regulation, but rather that regulation should be uniform. Such uniformity can be accomplished through a class exemption conditioned on satisfying specific requirements. It is premature to suggest specific requirements for a self-insured SBHP exemption, but they might include a minimum number of covered participants and a reasonable solvency requirement.

Land O'Lakes understands that state insurance laws regulating reserve and contribution levels will continue apply to a self-insured SBHP, even if a class exemption is developed. The Department must, however, preclude a state from imposing prohibitive reserve requirements as a back-door way of preventing all self-insured SBHPs from operating within the state. An argument can be made that such state action would be inconsistent with ERISA.

V. Concerns about Prohibiting Experience-Rating

While the Land O'Lakes self-insured plan does not currently develop premiums based on health claims experience (rather, premiums are based on age and geography), experience-rating different employers and working owner-groups may be necessary to maintain the solvency of the SBHP. The Department, however, has proposed that an SBHP *cannot* charge premiums based on the claims experience of a member employer's employees. As long as other health coverage providers remain able to experience-rate separate employers, this prohibition could easily lead to adverse selection. Employers with healthier employees would avoid membership in an SBHP that included less healthy employee populations. Land O'Lakes urges the Department to modify this proposal in the final regulations to permit at least some experience-rating.

A. Experience-Rating Would Not Render Nondiscrimination Protections Ineffective

The proposed regulations establish four nondiscrimination protections for SBHPs. An employer group (like a cooperative) cannot deny other employers and working owners membership in the group (and by extension participation in an SBHP) on account of any "health factor" of an employee, a former employee, or working owner. Neither the premiums for SBHP health coverage nor eligibility for plan benefits can vary based on a particular participant's health factor. And an SBHP cannot charge different premiums for different group members based on health claims experience.

The Department contends that by failing to prohibit experience-rating, the nondiscrimination protections could be ineffective (because a group could offer membership to all employers and working owners meeting the requisite membership criteria, but then charge specific group members higher premiums based on their health-claims experience). Land O'Lakes does not agree with the Department's analysis.

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For example, in cases where a prospective employer member may employ employees who utilize a significant amount of health care (i.e., “high-medical-utilizers”), this employer may benefit by finding more affordable health coverage through an SBHP, due to the fact that this employer *cannot* be denied membership in the employer group sponsoring the plan on account of these high-medical-utilizers. More affordable premium rates will likely be available to an employer with high-medical-utilizers because – on account of experience-rating – the SBHP will be able to attract employer members with “healthy” employees (by offering these employers a lower premium rate). The fact that these healthy risks may now be a part of the SBHP, these healthy risks are able to offset the exposure the high-medical utilizers may pose to the risk pool. This allows the SBHP to offer competitive premium rates that both employers with healthy employees *and* employers with high-medical-utilizers may find attractive.

The prohibition against basing premiums and eligibility for benefits on an individual’s health factor applies to existing group health plans, but fully-insured large group and self-insured health plans experience-rate participating employers. The ability of a fully-insured large group and self-insured plan to use experience-rating does not render the prohibition against basing premiums or eligibility for benefits on a health factor of a participant ineffective. Allowing employer groups (like cooperatives) sponsoring an SBHP to use experience-rating will similarly not impede the effectiveness of these nondiscrimination protections.

B. Experience-Rating and “Acting In the Best Interest” of Plan Participants

The Land O’Lakes self-insured SBHP would be governed by a Board elected by plan participants. This “control” is critical because it ensures that the cooperative Board members are “acting in the best interest” of participants covered under the plan. Experience-rating premiums for different employer and working owner-groups is done for the benefit of plan participants. If the SBHP did not develop different premium rates for different employer and working owner-groups, the solvency of the SBHP might be called into question, which could adversely affect the health coverage offered to plan participants. As a result, to ensure that affordable and quality health coverage is consistently made available, some level of experience-rating is necessary.

C. Experience-Rating Could Be Limited To Avoid Prohibited Health Status Factor Discrimination

The real problem appears to be that experience-rating a small group, such as one employer, could effectively cause the plan to base its premiums on the health status of a single individual, such as one high-cost employee. In addition, experience-rating a single, working owner is not only difficult, but this arguably runs afoul of HIPAA and the ACA. However, rather than an outright prohibition on experience-rating, the Department should require that a “rating group” be of a sufficient size to avoid targeting a very small group of members. In addition, each rating group could

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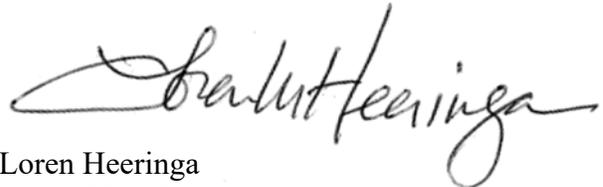
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be required to be established by reasonable factors that are not health status-related. For example, an SBHP might separately determine premiums for all covered persons who are members of a particular group (or cooperative) of a certain size, even if that group (or cooperative) is only made up of working owners (or working owner-farmers). Alternatively, premiums could be determined based on the geographical area in which a group of member participants reside, or employer members are domiciled. Such experience-rating may permit the SBHP to compete in the health insurance market and provide coverage at reasonable rates to its members.

Thank you in advance for considering these comments. Please do not hesitate to contact me with any questions, or if Land O'Lakes can serve as a resource on these very important issues.

Sincerely,



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