March 5, 2018

Submitted Electronically via: ***www.regulations.gov***

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, D.C. 20210

RE: Response to the Request for Information on the Merits of a Possible "Class Exemption" Under ERISA Section 514(b)(6)(B)

To Whom It May Concern:

The Self-Insurance Institute of America, Inc. ("SIIA") respectfully 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"). Our comments specifically respond to the Request for Information ("RFI") included in the NPRM, asking for input about the merits of developing a "class exemption," which would exempt self-insured "multiple employer welfare arrangements" ("MEWAs") from the non-solvency requirements of a State law regulating these arrangements, provided specified Federal rules are satisfied.

SIIA is a member-based association dedicated to protecting and promoting the business interests of companies involved in the self-insurance/alternative risk transfer marketplace. SIIA's membership includes self-insured employers, third party administrators, and stop-loss/reinsurance carriers, among other industry service providers.

Comments About the Merits of a Possible "Class Exemption" Under ERISA Section 514(b)(6)(B)

I. Issue a "Class Exemption" to Provide "Uniformity" In the Law

SIIA urges the Department of Labor (the "Department") to develop a "class exemption" under ERISA section 514(b)(6)(B). Our support for a "class exemption" largely rests on the need for uniformity. As the Department is well aware, Congress enacted ERISA to avoid the multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans. Consistent with the purpose of ERISA, developing a "class exemption" would provide a level of uniformity that would allow self-insured MEWAs to offer health coverage in multiple States free from the burden of complying with a "patchwork" set of regulations that differ State-by-State.

Make no mistake, SIIA is not suggesting that self-insured MEWAs should be freed from regulation, rather that such regulation should be "uniform."

II. Federal and State Policymakers Have Effectively Responded to Fraud, Abuse, and Insolvencies

Like the Department, SIIA is mindful of the history of self-insured MEWAs, which include fraudulent arrangements and solvency deficiencies. However, it is important to emphasize that policymakers at both the Federal and State level have taken steps to ameliorate the problems that have plagued self-insured MEWAs in the past. For example, in 1983, Congress specifically amended ERISA's preemption provision to give States the explicit authority to regulate self-insured MEWAs operating within the State. Since that time, States have enacted their own State MEWA laws with varying degrees of regulation – ranging from restrictive to permissive. Most recently, Congress strengthened the Department's ability to monitor self-insured MEWAs through increased notice and disclosure requirements as part of the Affordable Care Act ("ACA"). The ACA enhanced the Department's enforcement authority by providing extended civil and new criminal penalties, and also allows the Department to stop a MEWA's operations or seize its assets in certain circumstances without a court order.

III. Contrary to Other Claims, Self-Insured MEWAs Offer Quality and Affordable Health Coverage to Millions of Americans

It is important to emphasize that Federal and State policymakers have responded to the need to curb fraud, abuse, and insolvencies. We recognize that critics of SBHPs generally – and self-insured MEWAs specifically – will recite past problems, but it is important to point out that these issues have largely been contained over the past decade. There is no disputing that self-insured MEWAs currently offer well-governed, quality and affordable health coverage to millions of employees across the country.

That being said, SIIA does not believe that self-insured MEWAs should be unfettered from regulation. Rather, we submit that the Department should develop a "class exemption" that would include specific Federal rules that must first be met prior to a self-insured MEWA availing itself of any exemption from a State MEWA law's non-solvency requirements.

IV. A "Class Exemption" Will Promote Healthcare Consumer Choice and Competition Across the United States

SIIA believes that providing uniformity in the law will allow self-insured MEWAs to offer quality and affordable health coverage to more employees located in multiple States. Currently, self-insured MEWAs are effectively prevented from offering health coverage outside of the four corners of a particular State. This is because – as noted above – most States regulate self-insured MEWAs in different ways, meaning a self-insured MEWA wanting to offer health coverage in multiple States must navigate the different legal requirements and licensing practices in each State in which the coverage may be offered. The cost and time associated with complying with this "patchwork" set of regulations and licensing rules is prohibitive, thereby limiting consumer choice and competition. However, providing a uniform set of rules through a "class exemption" that must be met before self-insured MEWA health coverage can be offered to employees in a particular State *will* promote consumer choice and competition across the United States.

V. A "Class Exemption" Will Not Present Specific Risk to the Appropriate Regulation and Oversight of Self-Insured MEWAs

As previously outlined, many States have enacted State MEWA laws regulating self-insured MEWAs – some more restrictive than others. For example, various States have an outright prohibition against self-insured MEWAs operating within the State.[1] SIIA believes that such restrictive regulation is outdated and disallows consumer choice, especially considering the new oversight and enforcement authority Congress gave to the Department through the ACA. A much more reasonable – and appropriate – way of regulating self-insured MEWAs is through a single set of Federal requirements that must be met before a self-insured MEWA can begin offering health coverage in multiple States.

Providing specific suggestions on what may be considered "reasonable" and "appropriate" regulation is outside the scope of this comment letter. However, SIIA believes that the Department may consider developing a "class exemption" that codifies an existing State MEWA statute that the Department – and outside stakeholders – believe provides an appropriate level of regulation and oversight. The Department may even choose to include additional "class exemption" requirements that may complement its existing enforcement authority over self-insured MEWAs.

The bottom-line is this: Developing a "class exemption" that shields a self-insured MEWA from the "patchwork" of non-solvency requirements of State MEWA laws will *not* present any specific risk to the appropriate regulation and oversight of self-insured MEWAs if done in a thoughtful, methodical manner, and in partnership with State regulators and other stakeholders who remain critics of these arrangements. SIIA is fully supportive of such a rulemaking exercise and welcomes the opportunity to serve as a resource throughout the rulemaking process.

VI. State Insurance Laws That Establish Reserve and Contribution Requirements Will Continue to Apply to Self-Insured MEWAs

SIIA further believes that a "class exemption" from the non-solvency requirements of a State MEWA law will *not* present any specific risk to the appropriate regulation and oversight of self-insured MEWAs due to the continuing application of State insurance laws regulating reserve and contribution levels. Such reserve and contribution requirements should continue to apply – not only because the statute of ERISA requires their continued application – but because a defined set of solvency requirements are imperative to ensure the viability of self-insured MEWAs.

While we agree with the application of State reserve and contribution requirements, SIIA also believes that State reserve and contribution levels must be reasonable. Specifically, we believe it would be unreasonable for a State to enact a reserve level that is so high that the requirement is prohibitive. We understand that the Department does not have the authority to direct how a State should or could put into place a reserve requirement, consideration must be given to the fact that States may choose to enact prohibitive reserve levels as a back-door way of preventing self-insured MEWAs from operating within the State. An argument can be made that such State actions are inconsistent with ERISA.

[1] For example, except for certain "grandfathered" arrangements, California prohibits the formation of self-insured MEWAs. [CA Ins. Code sections 742.20 to 742.435].

VII. Adequate Consumer Protections Already Apply to Self-Insured MEWAs With or Without a "Class Exemption"

It is important to emphasize that a "class exemption" from the non-solvency requirements of a State MEWA law will *not* adversely impact the consumer protections that currently apply to self-insured MEWAs under ERISA and the ACA. This is because existing law already provides that a self-insured MEWA, as a "group health plan: 1) *cannot* deny a person who is eligible to participate in the plan health coverage if they have a pre-existing condition; 2) *cannot* refuse to cover preventive services (rather, the self-insured MEWA must provide free coverage for certain government-approved preventive services); and 3) *cannot* impose annual and lifetime limits on the "essential health benefits" covered under the plan. As the Department knows, these requirements were enacted under the ACA, and fully effective for plan years beginning on or after January 1, 2014. Other ACA requirements also apply, including: 1) covering adult children up to age 26; 2) free access to emergency care; and 3) the prohibition against rescinding coverage absent fraud.

Under ERISA, there are specific notice and disclosure requirements, and also fiduciary responsibilities that apply, requiring the self-insured MEWA and its employer members to act in the best interest of the plan participants. Participants have a private right of action to sue the self-insured MEWA or employers if there is wrong-doing. And, there are detailed procedures in place for filing health claims, as are rigorous internal and external appeals processes.

In addition, continuation of coverage requirements under COBRA apply, and according to HIPAA, premiums for self-insured MEWA plan participant *cannot* be developed based on the participant's health condition. Rather, premiums are developed based on the "health claims experience" of the entire group of employer members. Following best-practices, many self-insured MEWAs currently charge every participant the same premium rate.

SIIA recognizes that some stakeholders will raise concerns over the fact that self-insured MEWAs are not subject to the ACA's "essential health benefits" and "actuarial value" requirements, and also the ACA's adjusted community premium rating rules and the single-risk pool requirement. We believe that these concerns are mis-placed due to the applicable consumer protections discussed above. Moreover, we do *not* believe that a "class exemption" from the non-solvency requirements of a State MEWA law will do anything to alter the existing consumer protections under ERISA and the ACA.

If, however, the Department feels added consumer protections are necessary to ensure a specified level of coverage, the Department may – in consultation with the Department of Treasury – conclude that a self-insured MEWA with 50 or more participants (who qualify as a "full-time equivalent employee" in accordance with the rules and exceptions set forth under section 4980H of the Internal Revenue Code) must offer health coverage that provides "minimum value."[2] As the Department knows, to meet the "minimum value" test, a self-insured MEWA must cover many of the ACA's "essential health benefits," including hospitalization and physician services.[3]

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[2] A group health plan fails to provide "minimum value" if the plan fails to pay for at least 60% of the plan's covered benefits. [Section 36B(c)(2)(C)(ii) of the Internal Revenue Code].

[3] The Department of Health and Human Services developed a "Minimum Value Calculator" that most group health plans rely for determining whether the plan satisfies the "minimum value" test. [*See* https://www.cms.gov/cciio/resources/regulations-and-guidance/index.html, "Minimum Value Calculator"]. In addition, the Internal Revenue Service issued Notice 2014-69, providing that a plan fails to provide "minimum value" if the plan fails to substantially cover in-patient hospitalization services or physician services.

VIII. Suggestions on Promoting Actuarial Soundness, Proper Maintenance of Reserves, and Adequate Underwriting

The Department requests comments on how it can best use the provisions of ERISA Title I to require and promote actuarial soundness, proper maintenance of reserves, and adequate underwriting. While Title I of ERISA is primarily dedicated to setting forth notice and disclosure requirements, fiduciary responsibilities, and a private right of action for plan participants, among other things, SIIA believes that the Department can – through a "class exemption" under ERISA section 514(b)(6)(B) (which can be found under Title I of ERISA) – develop rules and requirements in the above stated areas. For example, to promote actuarial soundness, the Department may require a specified number of "lives" be covered under the self-insured MEWA in order to qualify for the "class exemption." To ensure proper maintenance of reserves, the Department may set forth a reasonable solvency requirement as a condition to qualifying for the "class exemption." With regard to requiring adequate underwriting – in SIIA's opinion – the current rules under HIPAA and COBRA already set forth standards ensuring the development of actuarially fair premium rates for self-insured MEWA participants.

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Thank you in advance for considering these comments. Please do not hesitate to contact me if you have questions, or if members of SIIA can serve as a resource on these very important matters.

Sincerely,

Mike Ferguson
President and Chief Executive Officer
Self-Insurance Institute of America, Inc.