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# Society of Professional Benefit Administrators

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The Honorable R. Alexander Acosta  
Secretary of Labor  
U.S. Department of Labor  
Employee Benefits Security Administration  
Office of Regulations and Interpretations  
200 Constitution Avenue, NW Room N-5655  
Washington, DC 20210

Submitted Electronically: EMAIL to e-ORI@dol.gov and via Regulations.gov

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

Dear Mr. Secretary,

The Department of Labor's (Department) Notice of Proposed Rulemaking proposes extensive changes to the definition of employer. The request for comments proposes changes to the Employee Retirement Income Security Act (ERISA) including the term "group or association of employers" under ERISA section 3(5)). The Society of Professional Benefit Administrators (SPBA) submits the following comments on behalf of Third Party Administration (TPA) firms for your consideration. SPBA is the national association of TPA firms hired by employers who work with employee benefit plans to provide outside professional benefits management. SPBA estimates that over one-half of all workers in the U.S. receiving non-federal health coverage are in plans administered in some form by TPAs. Their clients include employers of various size and forms of employment, including large and small employers, State/County/City plans, collectively bargained plans, as well as plans representing religious entities. Many SPBA members have expertise working with AHPs, from formation to marketing, underwriting and rate setting, to administration of benefits and claims, termination and winding-down of plans.

These comments draw on the insights and feedback from the broad employee benefit expertise of SPBA member TPAs inclusive of plan sponsors, plan trustees, plan participants and administrators. In a spirit of cooperation with the Department of Labor's request for comments, SPBA seeks the Department to clarify the issues we have raised below related to Association Health Plans (AHPs). Due to the current regulatory structure that impact AHPs, SPBA requests that any proposed Federal regulatory compliance requirements avoid complex and costly provisions that may subject the AHP to a regulatory atmosphere inconsistent with the core spirit and purposes of Executive Order 13813. SPBA supports in part the Department's proposal to amend the definition of employer in section 3(5) of ERISA as set out below but also recommends that the Department seek to convene a tri-agency meeting with the Department of Health and Human Services and Treasury to ensure the goals of the Executive Order can be achieved by enacting companion regulations.

## Background

On October 12, 2017, President Trump issued Executive Order 13813, "Promoting Healthcare Choice and Competition Across the United States," stating that "[i]t shall be the policy of the executive branch...to facilitate the purchase of insurance across State lines and the development and operation of a healthcare

system that provides high-quality care at affordable prices for the American people.” The Executive Order further states that the “Administration will prioritize three areas for improvement in the near term: AHPs, ... With regard to AHPs specifically, the Executive Order directed the Secretary of Labor... consider proposing regulations or revising guidance, consistent with law, to expand access to health coverage by allowing more employers to form AHPs.” The Executive Order further notes that “[l]arge employers often are able to obtain better terms on health insurance for their employees than small employers because of their larger pools of insurable individuals across which they can spread risk and administrative costs. Expanding access to AHPs can help small businesses overcome this competitive disadvantage by allowing them to group together to self-insure or purchase large group health insurance. Expanding access to AHPs will also allow more small businesses to avoid many of the PPACA's costly requirements. Expanding access to AHPs would provide more affordable health insurance options to many Americans, including hourly wage earners, farmers, and the employees of small businesses and entrepreneurs that fuel economic growth.”

On January 5, 2018, the Department published a Notice of Proposed Rulemaking proposing changes to the definition of employer under the Employee Retirement Income Security Act (ERISA) Section 3(5), in response to the Executive Order 13813. The Secretary was specifically directed to consider broadly redefining “group or association of employers” by allowing more freedom for businesses to join together to offer group health coverage regulated under the ACA as large group coverage.

### Overview

The Department in proposed regulations noted that “[l]arge employers have a long history of providing their employees with affordable health insurance options” and that the association health plan (AHP) regulation “is needed to lower some barriers that can prevent many small businesses from accessing such options.”<sup>1</sup>

SPBA commends the Department in maintaining the principal objective of the proposed rule to expand employer and employee access to more affordable, high-quality coverage. These comments are submitted to suggest specific situations where barriers that prevent small businesses from accessing large group health plan benefits could be lowered. SPBA supports the lowering of these barriers as a way to allow many individuals to participate in better and less expensive health coverage at minimal risk.

The proposed regulation will change Title I of ERISA to broaden the criteria under ERISA section 3(5) for determining when employers may join together in an employer group or association, and when it will be treated as the “employer” sponsor of a single multiple-employer “employee welfare benefit plan” and “group health plan” as those terms are defined in Title I of ERISA. The benefit of the Department’s regulation to treat the association as the employer sponsor of a single plan, is to facilitate the adoption and administration of such arrangements.

### Making AHPs Viable Options for Small Business Includes an Exemption of Self-funded AHPs/MEWAs from State Insurance Regulations

The Department has requested input on potential approaches to exempt self-insured MEWAs from state insurance regulations. The SPBA strongly encourages the Department to exercise their power to provide a limited exemption for self-funded Association Health Plans from state insurance regulations.

Under the proposed regulations, employers of all sizes would be eligible for the Department’s new AHP option, which means that employers currently in the small group or individual market are likely to combine into associations that would characterize them in the same way as the large group market, where Affordable Care Act (ACA) requirements, like essential health benefits, (EHBs) would not apply. The SPBA strongly supports the concept in the proposed regulations, that under the proposed regulations, the Department would no longer “look through” the association to its employer members when determining group size. This concept

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<sup>1</sup> 83 Fed. Reg. 614, 626 (1/5/2018)

would allow fully-insured AHPs covering more than 50 employees to be treated as large group plans, making them not subject to many of the insurance rules that apply in the small group and individual markets— such as covering all of the ACA-listed EHBs. SPBA strongly believes that in the spirit of the Executive Order, the Department should likewise extend the concept to self-funded AHPs as a way to level the playing field for all AHPs doing business in the State and to ease regulatory burden for all AHPs. As such, SPBA strongly encourages the Department to utilize its heretofore unexercised power under ERISA section 514(b)(6)(B) to prescribe regulations regarding “non-fully insured” MEWAs that will treat self-funded MEWAs in the same manner as fully-insured MEWAs. This regulatory action will bring much needed clarity to the issue of jurisdiction and governing standards requiring the maintenance of specified levels of reserves to the States.

Many successful self-funded and fully-insured MEWAs currently exist to provide health coverage to employees of employers of all sizes across the United States. They do so because they are ERISA plans that comply with current MEWA regulations, subject to Federal regulations that also comply with State regulations, when required to do so. The only exception is that they do not and cannot enjoy large group status and certain advantages provided only to large groups.

Under the proposed regulations, AHPs would provide benefits to a greater number of employees and would be able to set premiums based on the experience of the group rather than be limited to a community rate based on location, age, family size and tobacco use. Under the proposed regulations, large group fully-insured plans would still be subject to state-mandated benefit requirements and other consumer protections. Self-funded AHPs would be subject to Federal requirements and some, but not all, state insurance requirements. The proposed regulation will not preempt State laws. As established in ERISA, and through sub-regulatory guidance, States will continue to regulate AHPs as multiple employer welfare arrangements (MEWAs), whether fully insured or self-funded. Additionally, States will continue their longstanding authority over the insurers of these plans. Currently, self-funded plans are not subject to any state laws that “relate to” employee benefit plans. SPBA strongly supports that the Department extend an exemption to self-funded AHPs. Should the Department exercise its authority under ERISA, all AHPs, including self-funded AHPs, would remain subject to State insurance laws that provide standards requiring the maintenance of specified levels of reserves and contributions. To do so will address the historical concerns of self-funded MEWAs and provide a means of ensuring the payment of promised benefits and regulatory oversight of all AHPs.

SPBA recognizes the authority of States with regard to self-funded and fully-insured MEWAs and supports efforts to provide additional clarity and guide-rails that will make AHPs a safe and viable option for health coverage. SPBA believes that the proposed regulation effectively aligns the Department’s desire to broaden the conditions under which AHPs can provide health care to employers of all sizes, while addressing the important interest of State regulators to control fraudulent behavior of some MEWAs as historically reflected in the past. As such, SPBA requests that the Department retain the role of regulator to self-funded AHPs to maintain a Federal standard rather than a patchwork of State regulations. The Secretary of Labor, within their enforcement authority, would retain the power to issue cease and desist orders and to execute summary seizures of assets when necessary. Moreover, because AHPs would still be considered MEWAs under Federal regulatory compliance, they would continue to be subject to Federal ERISA regulations. As such, they would still be required to file the Federal Form M-1 and 5500.<sup>2</sup> They also have filing obligations consistent with the rules governing the conduct of plan fiduciaries, ERISA claim procedures, PPACA, the Consolidated Omnibus

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<sup>2</sup> ERISA requires any plan MEWA/AHP (a MEWA that is also an ERISA plan) to file an additional report annually with the Department. This is the same annual report filed by all ERISA plans that include 100 or more participants or hold plan assets, filed using Form 5500. See ERISA section 101(g) and 29 CFR 2520.101-2. Both Form 5500 and Form M-1 information is accessible by DOL, as well as the States, to fulfill traditional oversight functions to help ensure that plans meet their obligations to pay benefits as promised under the plan and the law.

Budget Reconciliation Act of 1985 (COBRA), the Health Insurance Portability and Accountability Act (HIPPA), the Newborns' and Mothers' Health Protection Act, the Mental Health Parity Act, and the Women's Health and Cancer Rights Act are also subject to MEWAs. Generally, a MEWA that is not an ERISA plan, is not subject to these requirements directly and the proposed regulations bring AHPs under those ERISA standards.

The Federal oversight power is especially important in light of the potential of AHPs to cross state lines, and could avoid duplicative or conflicting State AHP regulations. SPBA supports the proposition that the Department could, as a condition of the exemption permitting self-funded AHPs, require a minimal level of coverage by self-funded AHPs. Should the Department permit self-funded AHPs to stand on par with fully-insured AHPs, States would retain the power to regulate the maintenance of specified levels of reserves and provisions to enforce those standards. In fact, States may want to assess self-funded AHPs for the purpose of establishing a reinsurance fund for the purpose of funding insolvent self-funded AHPs should they arise. The State would need to demonstrate that the fee or assessment qualifies as solvency and contribution standards. A State may want to impose a "free rider" assessment to be used to shore up cost increases resulting from the limitations of the State's small group market. SPBA supports the concept of a Federal regulatory standard for employers operating in all 50 States to enable AHPs to implement a single AHP plan design that would comply with the Federal requirements rather than having 50 separate State requirements.

SPBA strongly believes that these important enforcement powers should remain in the hands of the Department to ensure AHPs will only have to comply with one set of regulatory requirements. Otherwise, the States would continue to remain the primary regulators of MEWAs under the State insurance codes. States will continue to prescribe benefit mandates that apply to fully-insured arrangements. For self-funded MEWAs, a state could impose adjusted community rating rules, solvency and contribution standards. SPBA understands that the State Departments of Insurance share a concern that AHPs could offer plans with substandard benefits or that consumers would not be aware of or understand that they are buying limited benefit plans. SPBA believes that this concern can be remedied if the Department were to require, as a condition of the exemption permitting self-funded AHPs, that such plans provide major medical coverage, or adhere to community rating rules.

As such, a surcharge can be utilized to substitute for underwriting. For example, a 20% surcharge on first year groups, reduced to 10% in the second year and with no subsequent surcharge will provide protection to the plan as requested by the Department and the States. SPBA proposes that this risk stratification methodology is critical to make the self-funded AHPs successful. Utilizing short form apps with the caveat that carriers will not decline anyone is a crucial element, but there must be some sort of adjustment. Without this ability, the AHP program will suffer the same fate as the COOPs.

#### Commonality of Interest

The Department's proposal to expand the "commonality of interest" test in ERISA's employer definition will distinguish bona fide association plans from state-regulated commercial insurance offered to the public at large. The proposed regulation would continue to distinguish employment-based plans from commercial insurance programs and administrative service arrangements marketed to employers. Historically, the Department required an organizational purpose and relationship unrelated to providing benefits, and control exercised over the program by employer participants. The Department correctly states that ERISA is vague on what constitutes "commonality" and SPBA encourages the Department to broadly interpret ERISA's purposes and to expand access to healthcare through statutory changes that encourage and recognize changing market dynamics as adopted in sub-regulatory interpretive rulings under ERISA section 3(5).

SPBA supports the expansion and flexibility of the "commonality of interest" provision and supports the concept that sufficient consumer protections arise under ERISA's existing framework. The proposed regulation's commonality of interest provision would be satisfied by employers that were either (1) in the

same trade, industry, line of business, or profession, or (2) located in the same state or metropolitan area. Employers could also form AHPs for the express purpose of offering health coverage to members. Most importantly, the AHP would retain protections under ERISA and the group or association would be required to have a formal organizational structure for controlling plan administration. Only current and former employees of employer members (and their dependents) would be allowed to participate in the plan.

#### Sale of Insurance Across State Lines

The Department seeks comment on whether the final regulations should recognize other bases for finding a commonality of interest. A reading of the proposed regulation relating to States and metropolitan areas allows an AHP to satisfy the commonality requirement if its members have a principal place of business within a region that does not exceed the boundaries of the same State or metropolitan area (even if the metropolitan area includes more than one State). SPBA supports the effort by the Department to expand opportunities for small employers to provide health coverage for their employees by allowing AHPs to provide coverage across state lines. We recognize that the States will need to clarify how they will regulate these types of health plans on an ongoing basis. If this expansive approach were taken, it would spell success for AHPs in the originating State and for AHPs that cross State lines. This is especially important in rural areas where farmers need health coverage and often farm land is located in more than one State.

The proposed regulation establishes that an AHP can be established in a State with fewer coverage requirements and less restrictive issue and rating rules. The AHP would be allowed to use the State's requirements in all States, even in those States with greater regulatory requirements. Currently, non-AHP insurance plans continue to be subject to each State's requirements. The resulting fragmentation of the small group market begs for a resolution in the interest of reaching the broad meritorious goals of the Executive Order. Maintaining reciprocity for some, if not all AHPs, among the States is a viable option and provides an opportunity for the Department to show that the risk is small, relative to the benefits to be realized by small businesses, and their employees, once they gain access to more affordable insurance. Association Health Plans are needed as a way to chip away at the otherwise unobtainable health care delivery system. SPBA believes that it is time for self-funded and fully-insured AHPs to evolve and fill the need in the current small group and individual marketplace and to take their place under Federal and State regulatory markets. As under the current rules, the AHP would continue to be required to have a formal organizational structure, either directly or indirectly, for controlling plan administration and other functions. Only current and former employees of employer members (and their dependents) would participate in the plan.

#### Group or Association Plan Coverage Limited to Employees of Employer Members and Treatment of Working Owners

The Department's proposed regulatory change to include "working owners" as employers eligible to form or join AHPs is insightful and forward-thinking. This break from the existing regulatory definition means that inclusion of business owners, without employees, have the same opportunity to seek ERISA group health coverage where they have traditionally been excluded due to sub-regulatory guidance addressing ERISA's group health plan provisions. If adopted, the regulatory changes will allow business owners to join AHPs as employers, and participate in the plan as employees. While commendable, this is not to say that the change will be an easy one or one without complications. SPBA requests that the Department establish whether the definition of "business owner" is sufficient to enroll in AHP coverage. SPBA understands the motivation of the Department to expand AHPs to permit working owners of an incorporated or unincorporated trade or business, including partners in a partnership, to elect to act as employers for purposes of participating in an employer group or association sponsoring a health plan, and also to be treated as employees with respect to a trade, business or partnership.

SPBA has concerns that the proposed regulation's definition of "working owner" is overly broad. The definition will include any trade or business, without common law employees, regardless of the legal form in which the business is operated (e.g., sole proprietors or other working owners of businesses, whether

incorporated or unincorporated). Our concerns include the very real option given to business owners to self-select to act as an employer for purposes of participating in an employer group or association. SPBA requests that the Department determine guiderails around the definition of “working owner” that include whether a working owner may fall into the category of employee of a separate trade or business and also as a “working owner” of a separate business for purposes of being covered by the employer group's or association's health plan.

SPBA supports the provisions that as a way to make distinctions between group and individual coverage, the business owner will be required to earn income for providing personal services to the trade or business, and either (1) provide an average of at least 30 hours per week (or 120 a month) of these services, or (2) earn income from the business at least equal to the cost of coverage under the plan. The individual also could not be eligible for group health coverage from another employer or a spouse's employer. SPBA generally supports these provisions, but has concerns that the proposed regulation will allow the group or association sponsoring the AHP to rely, absent knowledge to the contrary, on representations from the individual seeking to participate as a “working owner” as a basis for concluding that these conditions are satisfied.

The proposed regulation further establishes criteria intended to ensure that, for purposes of ERISA Title I, the groups or associations sponsoring the covered AHPs are bona fide employment-based associations. If a “working owner”, individual or owner, joins an AHP, SPBA would like guidance on how to establish whether they will they be allowed to work 30 hours in one or in separate businesses. In addition, we would like to know whether the Department has considered that a business owner may simultaneously be an employee of someone else, while maintaining an outside job as an independent contractor as well? If the AHP is to truly expand competition, then the regulations should not limit choice by the member firm and or individual to pick the most competitive offering for themselves.

SPBA understands the Department's effort to establish a better framework to simplify the rules so that they are easy to understand. However, with regard to whether the working owner has met the criteria to ensure that a legitimate trade or business exists, the Department includes a proposal that shifts the responsibility to establish the legitimacy of the business entity comprised of participants who are common law employees, common law employees and working owners, or comprised of only working owners to the AHP. SPBA strongly suggests that the Department establish additional guidance to assist AHPs in making determinations for eligibility for AHP coverage under the “working owner” designation. One option is for the Department to insert into the regulations a requirement that an independent contractor is not treated as an employee. SPBA would also request additional clarification regarding interpretation of the COBRA<sup>3</sup> MEWA regulations and how continuation benefits under the regulation would be implicated in this scenario for AHPs and how the fees would be calculated. Additionally, we request guidance on the situation after the COBRA period has been satisfied, whether someone can return to the plan without any requirements. We find troublesome tracking a plan participant who would drop in and out of eligibility who has not maintained their eligibility for a period of time.

SPBA has concerns that the measurement of 30 net number of hours is not subject to verification. SPBA requests that the Department do additional study of actual minimal size of employers eligible to join AHPs. SPBA has concerns that if we are looking to be all things to all sized firms, we may be injecting additional risk with small-sized firms or single employee “working owners” in a way that may devalue and destabilize the AHP in the long run. Further, SPBA would like to establish that going forward, AHPs that already meet the Department's current “commonality of interest” and “employer-member control standards” will continue to be treated as meeting those requirements under the proposal for sponsoring a single multiple employer plan under ERISA.

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<sup>3</sup> Treas. Reg. Section 54.4980B-2 Q&A-6, I.R.C. Section 4980B(g)(2), 42 C.F.R. Section 411.102

SPBA's concerns are not unfounded. Our members work on a regular basis with small employers and provide guidance to them on how to manage their benefit plans. We believe that the proposed AHP regulations contain a fundamental flaw, in that they expect small employers to be sophisticated in insurance law and immediately be able to manage their health risk in the same way as larger employers, who have the resources to reduce health care costs through wellness plans, employee engagement, and claims management. Pooling small employers into AHPs based on the assumption that they can achieve a better cost outcome must be done carefully.

The Department's proposal states that the AHP would be responsible for managing their AHP. At the same time, the Department points to a history of failed MEWAs that in the past gave unskilled small employers the responsibility to manage their MEWA, but who did not understand the cost of risk and the rate-making discipline required to assure the success of their MEWA. SPBA also has concerns, the difference is that TPAs believe that with proper guidance by skilled administrators, AHP members who demand lower costs for their plans, or who unknowingly attempt to take action to render insolvency problems for the AHP, their actions could be reviewed in advance, and corrective actions taken, before consumers are hurt.

SPBA shares the Department's goal for healthy AHPs that provide coverage for all small employers. However, we must also understand the nature of some small employers which may include financial instability. We are concerned that the universe of small employer AHPs may see their membership rise but also experience a high degree of volatility. SPBA does not want to see AHPs that are fiscally unstable due to the volatility of member participation. Even assuming the AHP could offer a "competitive" insurance product, many of the small employers may not have the finances to purchase even a basic ACA compliant health plan.

#### AHPs Subject to Nondiscrimination Rules

Under the proposed regulations, AHPs will be subject to nondiscrimination rules that bar all group plans from conditioning eligibility, benefits, or premiums on health status. The goal is noteworthy, to help AHPs to assemble, large, stable risk pools, while limiting the risk that AHPs may tend to enroll healthier, small businesses and thereby adversely affect individual and small group markets.

SPBA strongly supports the proposed regulation's effort to maintain that all fully-insured and self-funded AHPs continue to be subject to HIPAA's nondiscrimination rules, which prohibit varying eligibility or benefits among "similarly situated individuals" based on a health factor. Additionally, while HIPAA allows variations according to certain bona fide classifications, SPBA supports the Department's decision to not permit such variations among employer-members of an AHP. SPBA agrees with the Department that the health nondiscrimination provisions are essential to the goals of the proposed regulations. However, SPBA believes that the proposed regulation may make it difficult for AHPs to project costs and set premiums, given that an AHP may not exclude costlier employers. The discrimination rules could, in some cases, result in significant cross-subsidies between member employers. Thus, the size of an AHP may be an important factor in its ability to project costs and even out variations in the health costs of the different member employers. The Department does not eliminate the factor that States could require AHPs to comply with key consumer protections and financial standards. SPBA has concerns that the Department did not issue these regulations jointly with the Department of Health and Human Services (HHS) due to the fact that the application of the guaranteed renewability rules<sup>4</sup> have an impact on arrangements that are not bona-fide association plans. Clarification of this proposed regulation and the HHS regulations are important and necessary.

SPBA agrees that AHPs provide an innovative option for small businesses to expand access to employer-sponsored coverage. AHPs permit employers to band together to purchase health coverage and can help reduce the cost of health coverage by giving groups of employers increased bargaining power. Whether the new regulations will effectively create administrative efficiencies by allocating plan responsibilities and plan

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<sup>4</sup> 45 CFR sec. 144.103

obligations to provide and administer benefit programs from participating employers, who may have little expertise in these matters, to the AHP sponsor, remains to be seen.

SPBA supports the proposed regulatory change of an AHP to reap the benefits of rules under current Federal regulations. The ACA does not allow premium variations by industry or occupation for any group or individual. Unless prohibited by State regulation, an AHP could vary its rates based on the industry or occupation of the applicant. Industry rating is common in the large group market and was common in the small group market prior to the ACA. Some states limit the percentage differential that can be used for groups, but not all States have such restrictions. Being able to charge higher rates to groups operating in industries that tend to have higher health costs and lower rates to groups in lower cost industries provides a key rating advantage to AHPs over plans subject to ACA restrictions.

The DOL proposed rules provide that the group health plan sponsored by the group or association must comply with the HIPAA/ACA health nondiscrimination rules, which govern eligibility for benefits and premiums for group health plan coverage. In determining what is a group of similarly situated individuals for purposes of applying those rules, this proposed regulation provides in paragraph (d)(4) how to apply these HIPAA/ACA health nondiscrimination rules in the context of a group or association of employers sponsoring a single group health plan.<sup>5</sup>

The Department specifically solicited comments on how the nondiscrimination requirements can balance risk selection issues with the stability of the AHP market and the ability of employers to innovate and enter voluntary coverage arrangements. SPBA has concerns that the Department's proposed regulation's requirement for ACA nondiscrimination compliance may have the effect of limiting the AHPs ability to establish rate levels for health plans that offer a meaningful cost advantage to the members of the group. SPBA has further concerns that the proposed AHP regulation will impact how rates are set. Third Party Administration firms specialize in medically underwritten small group health plans and they assist employer plan sponsors in offering ERISA qualified ACA compliant health plans for groups of 2 or more on a level funded platform. These plans are medically underwritten and offer small employers an opportunity to actively manage the cost of their health plans. SPBA member firms may offer a proprietary underwriting process designed to calculate the projected medical consumption of every person to be insured under the plan and arrives at a premium that covers the projected losses for that group for that policy term. It is important to note that this action is taken without denying coverage to anyone applying for benefits coverage.

SPBA has concerns that without the ability to underwrite and set rates appropriate for the population with the Association Health Plans the proposed AHP regulation will essentially become irrelevant. Additionally, ACA compliance will have the effect of making AHP plans less cost competitive for the members. SPBA requests that the Department amend the regulation to allow the ability to underwrite the medical risk and to provide for financial oversight by qualified third parties and Federal or State regulators.

#### The Definition of a Metropolitan Area

Under the ACA, geographic rating zones are determined through Federal regulation with input by the states. All insurers within a State must set their premiums using identical rating zones, although they can vary the area factor used for each pre-established zone to reflect cost differences, but not morbidity differences, by zone. Some States set their ACA zones such that a mix of higher-cost and lower-cost areas were included in a zone so as to help limit rates that otherwise would be charged in the higher-cost area of the zone. Subject to State regulatory authority, an AHP can determine its own rating zones as well as its geographic area factors by zone. This allows it a strategic advantage over an ACA issuer that operates in multiple zones within a state. For instance, an AHP could split an ACA geographic zone into two rating areas in order to be more

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<sup>5</sup> Code section 9802(a)(1), ERISA section 702(a)(1), and PHS Act section 2705(a)(1). See also 26 CFR 54.9802-1(a), 29 CFR 2590.702(a), and 45 CFR 146.121(a).

competitive in the lower-cost area and charge higher rates in the higher-cost area. It could also choose not to market in the higher cost area. SPBA believes that geographical delineations using the SMSA are reasonable.

The Department is interested in whether a federal designation by the U.S. Census or the Office of Management and Budget (OMB), which delineates metropolitan and metropolitan statistical areas according to published standards<sup>6</sup>, or another definition, should be used and, if so, how, for purposes of establishing eligibility for continued or new employer membership (e.g., at the beginning of each plan year).

The Department invites comments specifically on whether more clarification would be helpful regarding the definition of a metropolitan area and also whether there is any reason for concern that associations could manipulate geographic classifications to avoid offering coverage to employers expected to incur more costly health claims. SPBA finds that manipulation from geographical area structure is more likely to occur if the ability is given to create smaller regional AHPs. Many TPA firms in rural areas hear from farmers of their challenges and problems in finding and affording reasonable health care coverage. Often these challenges are complicated even more based on where the policy is situated, even when the farm is located in more than one geographic area. SPBA respectfully requests that the Department not restrict metropolitan area to one state as too restrictive. If AHPs are available in multiple states, it would not be a problem for large farms, unless they are required to file in each state. In other areas, such as the New England area, the metropolitan area includes 4 different states.

Even if full risk rating is not permitted, we request that some mechanism be put into place to prevent employers from “forum shopping.” It is common for a self-funded group with access to its own claims data to be aware that, based on current claims, it is likely to experience large dollar claims in the immediate future. We are concerned that these groups will seek shelter in our large, community-rated group and then leave when their shock loss cases have resolved themselves. In order to protect against this forum shopping, we find that one option is to reserve the right to impose a risk factor surcharge for the first two years of participation in the plan. After that time, the group reverts to the community rate without regard to their then-current risk profile. For the same reason, when a group leaves, AHPs can require a 3-year waiting period before they can rejoin the plan. These two practices provide stability for all plan members without imposing unduly harsh limits on participation on the basis of health factors.

For these reasons, SPBA strongly recommends that the Department utilize Census Bureau data to define metropolitan areas to allow for the broadest definition possible. SPBA recognizes that complications arise, but with a Federal level standard, that allows for each State to set their own financial requirements, this would allow the States to retain compliance and AHPs can avoid a patchwork of State regulation.

#### Effect of Additional or Different Non-discrimination Protections

Specifically, the Department invites comments on whether paragraph (d)(4) is an appropriate or sufficient response to the need to distinguish AHPs from commercial insurance (and on any alternative provisions that might achieve the same goal, as well as on whether paragraph (d)(4) could destabilize the AHP market or hamper employers' ability to create flexible and affordable coverage options for their employees.

The ability for the AHP to price for risk and to adjust for risk over time at the member employer level in the Self-funded model must be a part of the equation or the value of the AHP over time will be limited. The department is correct to identify the complexity of the regulatory atmosphere of self-funded MEWAs. Under the current regulatory environment, insurance laws and regulations vary by State, and AHPs would likely carefully consider the regulatory environment before determining whether to enter a State market. AHPs would need to consider the rules of the AHP state of domicile as well as any applicable rules in the other states in which the AHP wants to participate.

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<sup>6</sup> See [www.census.gov/programs-surveys/metro-micro.html](http://www.census.gov/programs-surveys/metro-micro.html)

As noted earlier, some States require pure community rating. States with strict rating rules are less desirable candidates for an AHP's state of domicile, because the state rules would limit their rating flexibility and thus their potential advantage over ACA plans. However, States with strict rating rules would be good candidates for states in which an AHP might choose to market—AHP rating flexibility would allow them to offer more attractive premiums for younger adults, for instance. AHPs might be less inclined to market coverage in States that allowed individuals to keep their prior non-ACA-compliant coverage; in these States, lower-cost individuals and small groups may already have plans with more rate flexibility than ACA plans.

Federal and State healthcare laws, including the Affordable Care Act, include a variety of requirements that sometimes differ based on whether health coverage is insured or self-insured, and if the coverage is insured, whether it is offered in the individual, small group, or large group health insurance market. Whether coverage is offered in the individual or group health insurance market is determined by reference to ERISA. Specifically, "individual market coverage" is health insurance coverage that is offered other than in connection with a group health plan.<sup>7</sup> A "group health plan" is generally defined as an employee welfare benefit plan under ERISA section 3(1), to the extent the plan provides medical care.

Under current law, self-insured group health plans are exempt from each of these obligations regardless of the size of the employer that establishes or maintains the plan. These differences in obligations result in a complex and costly compliance environment for coverages provided through associations, particularly if the coverages are simultaneously subject to individual, small group, and large group market regulation. Protection from the applicability of State laws regarding MEWAs based in other States will be a key determinant of how effectively AHPs can compete, particularly in the event such laws subject the AHP to many, if not all, of the rating and underwriting requirements the State has in place for its ACA business.

The impact of this proposed regulation is significant and SPBA commends the Department for providing additional opportunities for employer groups or associations to offer health coverage to their members' employees under a single plan. This will offer many small businesses more affordable alternatives than are currently available to them in the individual or small group markets. As you know, TPAs play a central role in assisting plans in compliance with State and Federal regulatory requirements, especially small self-funded employers who rely heavily on the assistance of TPAs to maintain compliance with Federal reporting obligations. SPBA recommends that the Department impose a requirement that self-funded AHPs use State-licensed Third Party Administrators and Insurance professionals to manage the day-to-day operation of the AHP. Since the State maintains the licensing oversight of insurers, insurance agent or TPA, this will provide additional assurance that the AHP will not fail due to mismanagement of unknown organizers. SPBA members regularly receive state licensing information to ensure they are compliant with State laws in the States where their clients are located.

#### Additional Comments Regarding ERISA and ACA Compliance

The Department has invited comments on the interaction with and consequences under other State and Federal laws, including the interaction with the Code Section 501(c)(9) provisions for Voluntary Employees' Beneficiary Associations (VEBAs), should an AHP want to use a VEBA. SPBA recognizes that utilizing VEBA rules can add another layer of administrative complexity especially if there is a requirement to refile with the IRS when they change benefits. We believe that the uncertainty of these provisions, absent additional information, could keep some from utilizing VEBAs. However, there are very successful VEBAs, especially in rural areas where they can be used to stabilize AHPs and reinforce the use of a trust. SPBA strongly believes that this is one example where coordination between the Department and another Federal Agency, specifically the Treasury/IRS, is important to the success of AHPs that attempt to comply with VEBA rules which conflict in many aspects. The proposed regulations do not provide that guidance at this time. The IRS

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<sup>7</sup> PHS Act section 2791(e)(1)(A). See also 26 CFR 54.9801-2; 29 CFR 2590.701-2; 45 CFR 144.103.

would need to provide guidance on whether it intends to expand the VEBA rules to permit multi-state VEBAs or VEBAs that do not require a same line of business connection.<sup>8</sup> Perhaps a simple solution would be to allow a VEBA to decline to elect AHP status when a conflict exists, but it is doubtful whether this option expresses the desire of the Department to widely expand AHP status.

The Department also invited comments on whether additional notice requirements are needed to ensure that employer members of associations, and participants and beneficiaries of group health plans, are adequately informed of their rights or responsibilities with respect to AHP coverage. SPBA strongly supports the notion that an AHP adequately provide notices, pursuant to ERISA, to participant employers as a contractual requirement and to make those notices searchable in a State database.

Thus, self-insured AHPs, even if covered by an exemption, would remain subject to State insurance laws that provide standards requiring the maintenance of specified levels of reserves and contributions as a means of ensuring the payment of promised benefits. While beyond the scope of this proposed rulemaking, the Department is interested in receiving additional input from the public about the relative merits of possible exemption approaches under ERISA section 514(b)(6)(B). The Department is interested both in the potential for such exemptions to promote healthcare consumer choice and competition across the United States, as well as in the risk such exemptions might present to appropriate regulation and oversight of AHPs, including State insurance regulation oversight functions.

In addition to prior comments stated herein, SPBA strongly recommends a phased-in implementation period to allow the vendor community and small businesses to complete the systems adjustments necessary to be able to file the reports requested with the appropriate data called for in the proposed regulations. The impact of the great volume of information that small employers would need to provide is significant. The fear that they may face penalties for lack of compliance is very real. SPBA has grave concerns over the complex nature of the proposed regulations that suggest that some small employers may not want to face the additional administrative requirements and make decisions that could negatively impact their employees' ability to receive health benefits at all.

### Conclusion

SPBA credits the Department for its AHP regulation which will profoundly and positively impact the health plan marketplace. These proposed regulations will significantly broaden the circumstances under which an AHP is treated as a single employer group health plan under ERISA, ACA and under State law. As such, AHPs will, as desired under the Executive Order, successfully enable small employers to bypass failed exchanges and create a positive Federal ERISA and State-compliant alternative for small groups to enable them to deliver less expensive but equally comprehensive benefit options for employers.

SPBA concurs that AHPs provide an innovative option for small businesses to expand access to employer-sponsored coverage. AHPs permit employers to band together to purchase health coverage and can help reduce the cost of health coverage by giving groups of employers increased bargaining power.

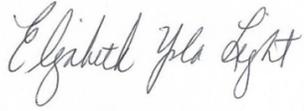
For the reasons stated above, SPBA supports, in part, the proposed regulatory change to modify the definition of employer, by creating a more flexible "commonality of interest" test for the employer members than the Department had previously adopted in sub-regulatory interpretive rulings under ERISA section 3(5). SPBA believes that an AHP will reap the benefits of rules under current Federal law and regulations, which generally apply to employer trade associations, Chamber of Commerce, or similar organization plans sponsored by the AHP constituting a single ERISA-covered plan.

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<sup>8</sup> Internal Revenue Code Section 501(c)(9) allows for benefits from a VEBA to be restricted based upon "objective conditions relating to the type or amount of benefits offered" under certain conditions and Treasury Regulation Section 1.501(c)(9)-2(a)(1) impose a requirement that employers be located in the "same geographic locale" to satisfy the employment-related common bond requirement.

SPBA appreciates the opportunity to provide these comments and would welcome the opportunity to provide additional clarifying comments if necessary and answer any questions you may have. If you have any questions or would like to discuss further, please contact Elizabeth Ysla Leight, Esq., at 301-718-7722 or via email at [Elizabeth@spbatpa.org](mailto:Elizabeth@spbatpa.org).

Respectfully submitted,

A handwritten signature in cursive script that reads "Elizabeth Ysla Leight". The signature is written in black ink and is positioned above the typed name and title.

Elizabeth Ysla Leight, Esq.  
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