March 6, 2018

The Honorable Preston Rutledge
Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
Room N-5655
200 Constitution Avenue NW
Washington, D.C. 20210

Submitted electronically via regulations.gov

RE: Definition of "Employer" Under Section 3(5) of ERISA – Association Health Plans (RIN 1210-AB85) – AHIP Comments

Dear Assistant Secretary Rutledge:

We appreciate the opportunity to provide feedback in response to the Department of Labor (DOL) Notice of Proposed Rulemaking (NPRM) titled Definition of "Employer" Under Section 3(5) of ERISA-Association Health Plans (83 FR 614). VIVA HEALTH, a Health Maintenance Organization (HMO) founded in 1995, is one of the largest health insurers in the state of Alabama. We administer plans for over 56,000 fully-insured and self-funded lives in the small group, large group, and student health markets as well as over 48,000 lives on our Medicare Advantage plans.

While we support the DOL's efforts to expand access to Association Health Plans ("association/s") for more businesses and see exciting opportunities in that market, we have significant concerns about many aspects of the NPRM in its current state. These concerns addressed below could be easily remedied to create final regulations that are more favorable to all parties involved.

Expanded Definition of "Employer" to include Working Owners (29 CFR 2510.3-5(a); 29 CFR 2510.3-5(e))

We do not support the inclusion of "working owners" who lack employees in the definition of "employer." Such a change would lead to significant disruption in the individual and group markets. "Working owners" without employees should be ineligible to join an association.

If the definition of employer is amended to include working owners, we urge the DOL to set greater restrictions on individuals qualifying as such (e.g., minimum limits for engagement in that business, such as 5 years, and higher income and time requirements than in the proposed rule). We also ask that the DOL require annual reporting from the association to verify through tax filings and/or state licensure that the working owner meets the definition of employer.

Definitions of Eligible Participants (29 CFR 2510.3-5(b)(6))

The definition of "eligible participants" should only include employees, former employees using COBRA eligibility standards, and the spouses, and dependent children of these eligible employees. The definition of "family" should be clarified that it is limited to spouses and dependent children, and the definition of "former employee" should be clarified to limit it to the definitions provided in the COBRA eligibility standards.

We strongly encourage the DOL to put protections in place for insurers and third party administrators who exercise reasonable diligence and act in good faith when enrolling participants purported by the association to be eligible. The DOL should hold the association fully liable for enrolling an ineligible participant in the association.

The Commonality of Interest Test (29 CFR 2510.3-5(c))

We do not support the expanded "commonality of interest" qualifications as proposed as they will lead to associations comprised of businesses that do not bear a reasonable relationship to one another and lack any vested interest in the health outcomes of their members. This is concerning because such a lack of relationship has historically led to consumer fraud, association insolvency, and unpaid medical claims.

The final rule should remove the proposed allowance for associations to form based solely on geographic commonality. However, if such an allowance is made, it should at a minimum limit geographic commonality to a contiguous location within a single state. Further, if businesses are able to join an association based solely on geographic commonality, the final rule should clarify HMOs would not be required to quote an association if a portion of its membership resides outside the HMO's service area.

We recommend the department instead expand the "bona fide association" test but narrowly define "trade, industry, line of business, or profession" and establish a formal process (either through the state or DOL) for certifying the legitimacy of an association and the businesses that comprise it and for monitoring the association for legitimacy and financial stability. We would support using the Standard Industrial Classification (SIC) set of definitions and limits for this test.

General Comments

- Employers should be limited to joining only one association at a time.
- We would like to see associations exempted from Guaranteed Availability rules to protect insurers from having to offer coverage to an association that may be unscrupulous or unstable.
- We would like to see rules in place that require premiums be paid from the association to the health plan and specific recourse for collecting premiums from the employers if the association fails to do so.
- We would support rules preventing associations from allowing year-round open enrollment for employers to join the association and instead only allow employers to join the association outside of the set open enrollment period due to a "qualifying event," such as a new business being allowed to join if it had not been established for the required length of time to qualify during open enrollment. We fully support set open enrollment and lock-in periods for businesses to join an association.

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- If groups are allowed to join an association year-round versus at a set open enrollment time, we would like to see the DOL limit associations to be comprised only of large groups (over 50 employees, collectively) to prevent disruption and employer abuse in the small group market.
- We ask that the final rule clarify whether health status applications would be allowed to be collected from members of the association for the purpose of determining premium. The employer's membership in the association would not hinge on the health status application of their employees, just the overall rates for the association. We would support the use of allowing health status applications for the purposes of determining premium.
- We would support the DOL setting minimum contribution levels required from each employer within the association.
- We would support requiring associations to register with the Department of Insurance (or equivalent agency) in the state where it is conducting business and for that state authority to regulate and enforce minimum capital reserves and solvency requirements for the association.

Thank you in advance for your consideration of our concerns and the opportunity to provide comments and feedback on the proposed rule. If you have any follow-up questions or comments, please don't hesitate to contact me directly at smasdon@uabmc.edu or (205) 558-7610.

Sincerely,

Samantha Davis
Manager of Regulatory Affairs and Strategic Development
VIVA HEALTH, Inc.