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Ms. Jennifer Cook
Senior Health & Life Policy Counsel
National Association of Insurance Commissioners
701 Hall of the States
444 North Capitol Street, N.W.
Washington, D.C. 2001-1509

Re: NAIC ERISA (B) Working Group Draft Revisions to the NAIC ERISA Handbook

Dear Ms. Cook:

Groom Law Group is providing comments on the NAIC ERISA (B) Working Group's latest draft revisions to the NAIC ERISA Handbook ("Handbook"), dated December 4, 2016. Our comments pertain to treatment of large group coverage that is issued to associations that, under applicable Department of Labor ("DOL") guidance, constitutes a single group health plan under the Employee Retirement Income Security Act ("ERISA") of 1974. Our comment specifically addresses the discussion in the Handbook titled "Association Coverage: Is it Individual, Small Group or Large Group Coverage?"

As recently revised, the draft Handbook appropriately acknowledges the well-established DOL authority that sets forth the circumstances in which an association will sponsor a single group health plan at the association level. However, like the prior draft revision to the Handbook, the current draft incorrectly goes on to suggest that when an association sponsors a single large group health plan as defined under ERISA, the application of Public Health Service Act ("PHSA") section 2705 (*i.e.* the HIPAA nondiscrimination rules) could preclude the association from treating each employer member as a separate similarly situated group, based on a "bona fide employment-based classification," with its own separate risk pool. If this view is adopted, fully-insured coverage provided to thousands of employers through association could be jeopardized. This would only further the incentives and trends for even very small employers to self-insure.

Specifically, the revised draft states:

> As a result of this guidance, states have taken different approaches to determining whether or not an association is acting as the employer and therefore can be considered a single large group health plan. If such a determination is made, it may follow that the association as a single employer would have to be rated in the

> same manner as a single large employer plan, without discriminating between employees or groups of employees within the plan based on health status or claims experience. Under 29 CFR 2590.702(d), a group health plan may provide different premiums or charge different premiums to "similarly situated individuals" enrolled in the plan on the basis of "bona fide employment-based classifications." These classifications include: "full-time versus part-time status, different geographic location, membership in a collective bargaining unit, date of hire, length of service, current employee versus former employee status, and different occupations." *However, 29 CFR 2590.702(d) is clear that a "classification based on any health factor is not a bona fide employment-based classification, unless the requirements of paragraph (g) of this section are satisfied (permitting favorable treatment of individuals with adverse health factors.)"* Therefore, it should follow that, just as a large employer's plan must be rated as a single risk pool rather than developing a separate experience rating for each office within the worksite, an association that is deemed to be a single employer should not be permitted to treat each employer member as a separate risk pool. However, the USDOL has not provided clear guidance on how these nondiscrimination rules apply to premium rating within an association that is rated as a single large employer plan.

Handbook at 73 (emphasis added). The draft, particularly the sentence in italics, misinterprets how the HIPAA regulations are construed with respect to a single group health plan, whether that single plan is sponsored by a single employer or an association. The proposed interpretation in the draft concludes that merely dividing up individuals based on similarly situated bona fide employment factors is underwriting based on health status, which is inconsistent with the regulation provision allowing for the differing treatment of similarly situated individuals.

Indeed, the purpose of the "similarly situated" test is to allow an employer to treat different groups of employees (or retirees) as a separate risk pool for purposes of determining the premium that will be charged to those groups. The rule specifically allows a plan or issuer to treat participants as two or more distinct groups of "similarly situated individuals" if the distinction is based on a "bona fide employment-based classification consistent with the employer's usual business practices." 29 CFR § 2590.702(d). Under the regulations, whether a classification is "bona fide" is based on all relevant facts and circumstances, including whether the employer uses this classification for other purposes that are independent of the qualification for health coverage. As the draft Handbook correctly acknowledges, examples provided in the regulations of classifications that may be "bona fide" include full-time versus part-time status, different geographic locations, date of hire, length of service, and different occupations. *Id.* The rule gives the following example of a "bona fide" classification:

> (i) Facts. A university sponsors a group health plan that provides one health benefit package to faculty and another health benefit package to other staff.

> Faculty and staff are treated differently with respect to other employee benefits such as retirement benefits and leaves of absence. There is no evidence to suggest that the distinction is directed at individual participants or beneficiaries.
>
> (ii) Conclusion. In this Example 3, the classification is permitted under this paragraph (d) because there is a distinction based on a bona fide employment-based classification consistent with the employer's usual business practice and the distinction is not directed at individual participants and beneficiaries.

29 C.F.R. § 2590.702(d)(4), Example 3.

The purpose of this aspect of the non-discrimination rule is to allow an employer to charge different premiums to different groups of employees in a single plan as long as those different groups are formed based on employment reasons rather than health status. Otherwise, to charge separate rates for different employees, the employer would have to go through the legal fiction and burden of creating separate plans. The proposed interpretation in the Handbook equates the simple process of dividing up the participant population based on similarly situated employment factors as underwriting based on health status and would eliminate the flexibility afforded to employers provided by these longstanding regulations.

There is no legal distinction for associations that act as an employer (as specifically permitted in section 3(5) of ERISA) and sponsor a single group health plan, when compared to an employer that sponsors a single employer group health plan. If the health insurance coverage provided by associations to their members is a single ERISA group health plan, all employees of the association's members would be part of the same group health plan. In that case, the association acting as the employer sponsoring the group health plan could distinguish among different employers participating in the plan so long as each employer constituted a distinct group of "similarly situated individuals" distinguished based on a bona fide employment-based classification consistent with the regulation. Associations could distinguish among different employers based on several bona fide employment-based classifications, none of which involve health status. For example, each employer within an association may be in a different location; consist of employees with different occupations than those of the other employers; be governed differently; and have a different compensation structure. In this case, the association could establish different premiums to the different employer groups and it would not violate the prohibition on health status based premium differentials.

As such, we suggest the following paragraph to replace the first full paragraph on page 73 of the draft:

> If the association sponsors a single group health plan, the plan or issuer may be able to treat each employer or groups of employers as a separate similarly situated group and risk pool based on the facts and circumstances. Under DOL

regulations, a group health plan or issuer may restrict benefits and/or charge different premiums for different groups of "similarly situated individuals" enrolled in the plan. 9 A plan or issuer may treat participants as two or more distinct groups of "similarly situated individuals" if the distinction is based on a "bona fide employment-based classification consistent with the employer's usual business practices." 10. Whether a classification is "bona fide" is based on all relevant facts and circumstances, including whether the employer uses this classification for other purposes that are independent of the qualification for health coverage. 11. Examples of nondiscriminatory methods of determining similarly situated individuals include different geographic locations and different occupations.

9. 29 CFR § 2590.702(b)-(d).
10. 29 CFR § 2590.702(d)(1).
11. Id.

We appreciate the opportunity to present these comments. If you have any questions regarding these comments, I can be reached at 202-861-6641, or at jbreyfogle@groom.com.

Sincerely,

Jon W. Breyfogle
Principal
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