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

***Attention: Definition of “Employer” under Section 3(5) of ERISA – Association Health Plans
RIN 1210-AB85***

Submitted via: <http://www.regulations.gov>

The National Association of Wholesaler-Distributors (NAW) is pleased to submit these comments in response to the referenced Proposed Rule published in the January 6, 2018 *Federal Register*.

NAW is the “national voice of wholesale distribution,” an association comprised of employers of all sizes, and national, regional, state and local line-of-trade associations spanning the \$5.6 trillion wholesale distribution industry that employs more than 5.9 million workers in the United States. Approximately 30,000 enterprises with places of business in all 50 states and the District of Columbia are affiliated with NAW.

NAW has long advocated the enactment of Federal legislation to facilitate the formation and multi-state operation of group health plans sponsored by bona fide trade, industry, and professional associations, and bona fide chambers of commerce and similar bona fide business associations. We continue to believe that the considerable role the Nation’s employers play in our health insurance delivery system combines with the capacity of trade associations to marshal the resources of the small and medium-size employer community, to render association health plans (AHP) uniquely attractive vehicles for providing quality health coverage to workers and their families.

On October 12, 2017, President Trump issued Executive Order 13813, “Promoting Healthcare Choice and Competition Across the United States.” NAW and our affiliated employers were encouraged by the inclusion of Section 2, “Expanded Access to Association Health Plans.” The pending Proposed Rule appears to fulfill the President’s expressed intention that the Secretary “consider ... allowing more employers to form AHPs ... expanding the conditions that satisfy the commonality-of-interest requirements under current Department of Labor advisory opinions interpreting the definition of ‘employer’ under section 3(5) of the Employee Retirement Income Security Act of 1974 ... (and) ways to promote AHP formation on the basis of common geography or industry.”

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NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS

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Employers Could Band Together for the Single Purpose of Obtaining Health Coverage

While the Proposed Rule appears to retain existing guidance regarding commonality-of-interest requirements, it departs from present guidance to permit AHP sponsorship by organizations created *solely* for the purpose of providing group health coverage. We urge the Department to reconsider this approach in light of two overarching concerns: first, its potential for generating adverse risk selection consequences will likely discourage bona fide employer associations from establishing AHPs. Second, the approach to this issue embraced in the Proposed Rule appears to run counter to the Department's objective, stated at the very outset of this rulemaking, of promulgating a regulation that "would continue to distinguish employment-based plans, the focal point of Title I of ERISA, from mere commercial insurance programs and administrative service arrangements marketed to employers." While the Proposed Rule contains other provisions designed to achieve the Department's objective in this regard, departing from current guidance in this way at the very least severely dims the bright line that must be vigorously maintained between employment-based plans and commercial insurance programs and seems highly likely to undermine insurance markets.

Revisions to the long-standing interpretation of what constitutes an "employer" capable of sponsoring an "employee benefit plan" under ERISA

NAW appreciates the agency's acknowledgement that many business owners are, in structure and in practice, *employees* of their companies. NAW agrees that the standards in the Proposed Rule should be workable for most employers and welcomes the flexibility the criteria options would provide for a working owner to establish his or her status as an employee of the business. As to elements of those criteria, NAW believes its employer members would find certain clarifications helpful to enable working owners to predict whether they would properly meet the earned income and hours worked requirements.

Hours worked for the trade or business. While working at least 30 hours per week or at least 120 hours per month providing personal services to the trade or business is a reasonable standard as it relates to other definitions of "full-time employee," it would be useful to recognize that many employers currently offer coverage to employees that satisfy other criteria. In addition to those employers providing coverage to part-time employees, the standard for "full-time employee" under the Patient Protection and Affordable Care Act (PPACA) includes concessions for variable employees, defined as employees for whom the employer cannot reasonably determine whether their hours will be at least 30 hours per week. This type of standard would recognize that any working owners' time can often vary due to various industry, seasonal, and other business and market factors. It would be particularly useful to owners of start-up businesses and other newly-formed entities who may not initially meet the objective hours-worked standards set forth in the agency's proposal but whose engagement in the business may fairly be assessed as an employment relationship.

Earned income from the business. The income a working owner earns from his or her business will often, but not always, equal or exceed the cost of providing coverage to the business's employees. For example, the owner of a start-up company may operate at a loss in the business' early going. NAW suggests that the agency consider providing a reasonable period of time for a new start-up entity to meet the earned income from the business standard.

Eligibility for another subsidized group health plan. Under the Proposed Rule, a working owner who is eligible to participate in *any* other “subsidized group health plan” would be ineligible to participate in the AHP offered to his or her employees. NAW believes that this standard is too restrictive in light of the reality of the variability of “subsidies” offered to employees and their spouses and dependents. NAW recommends that owners who are also employees of the business not be held to a different standard than other employees with respect to what amounts to a working spouse rule,¹ and that this condition for eligibility be eliminated.

Written representation of an employment relationship. NAW agrees with the agency’s proposal that is appropriate for a group health plan to rely on a written representation from a working owner as a basis for establishing that he or she has met the standards of being a “working owner” under the rules and does not believe a working owner should be required to provide additional evidence in support of that representation. We would note that this type of representation is consistent with establishing similar statuses; for example a group health plan’s representation that it is a grandfathered plan under section 1251 of the PPACA or an individual checking “yes” on Line 61 of his or her Form 1040 to indicate he or she maintains minimum essential health coverage as required by section 5000A of the Internal Revenue Code (IRC) as added by the PPACA.

Application of existing nondiscrimination protections

The Proposed Rule includes several nondiscrimination provisions that apply to a bona fide group or association and any health coverage offered by such a group or association. Under the Proposed Rule, the group or association must not condition employer membership in the group or association based on any health factor of an employee or former employees of the employer member (or their family members or other beneficiaries). Additionally, the group health plan sponsored by the group or association must comply with the Health Insurance Portability and Accountability Act (HIPAA) nondiscrimination rules (prohibiting discrimination based on a health factor in eligibility for benefits and premiums or contributions), and in so doing may not treat different employer members of the group or association as distinct groups of similarly-situated individuals.

NAW generally supports the nondiscrimination provisions included in the Proposed Rule. NAW appreciates the clarification provided in the regulation on how the HIPAA nondiscrimination rules would apply in the context of an AHP. In addition, NAW supports HR 1101, *Small Business Health Fairness Act* now pending in the US Senate Committee on Health, Education, Labor, and Pensions (HELP Committee), which contains similar protections related to contribution rates and availability of benefit package options for AHP coverage regardless of health status. The nondiscrimination provisions as proposed will provide important protections to employer members of associations who may have employees who have adverse health factors.

Clarification and simplification of regulatory structure

The Department also requested comments on all aspects of the Proposed Rule, the interaction with and consequences under other State and Federal laws, and requested information generally on how it can promote consumer choice and competition in health care. Although beyond the scope of the Proposed Rule, the Department specifically requested comments on possible exemption approaches on section 514(b)(6)(B) of the Employee Retirement Income Security Act (ERISA) under which the Secretary of Labor has the authority to exempt non-fully insured multi-employer welfare arrangements (MEWAs)

¹ Such “working spouse” exclusions are prohibited for insured plans in some states.

from certain state insurance regulations. The Department requested feedback on both the possibility that these exemptions could promote consumer choice and competition in health care, as well as the risks that these exemptions might present to appropriate regulation and oversight of AHPs.

While the Proposed Rule provides some additional flexibility which is necessary to allow additional groups of employers to join together to purchase health coverage for their employees through AHPs, it does not address many of the difficulties faced by existing national associations. NAW sees tremendous value in the ability to offer quality health coverage to their member employers, but existing legal requirements not addressed in the Proposed Rule have and will continue to create barriers to entry for our association and others. Employers operating in all 50 states and the District of Columbia are affiliated with NAW. Under the current state regulatory system, NAW is unable to design and implement a single AHP plan design that would comply with the requirements in all of them. Use of the Secretary's exemption authority in ERISA section 514(b)(6)(B) could remove many of these obstacles.

That said, were the Secretary to exercise his existing exemption authority, additional Federal legislative action will be necessary to allow the AHP market to reach its full potential. As previously noted, NAW has strongly supported and continues to advocate for Federal legislative initiatives to authorize the formation of multi-state AHPs, including the previously-referenced *Small Business Health Fairness Act* (HR 1101, 115th Congress) which was passed by the House of Representatives in March 2017. This legislation sets forth standards related to plan design and preemption to allow flexibility in the formation of AHPs while establishing important safeguards to protect AHP participants and beneficiaries. These include oversight rules and a certification procedure for AHPs, requirements for AHP sponsors and boards of trustees, and standards related to governing plan documents, nondiscrimination, maintenance of reserves and solvency, participant notice requirements, and fallback measures in the event of an AHP experiencing distress or termination. While NAW generally supports the Department's Proposed Rule and would support the use of existing exemption authority in ERISA section 514(b)(6)(B), we believe that Federal legislative action is required to meet the Administration's goal of expanding access to health coverage for the employees of small and medium-size businesses by allowing more employers to form AHPs.

Thank you for your consideration of NAW's views.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "James A. Anderson, Jr.", with a stylized flourish at the end.

James A. Anderson, Jr.
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