Air Conditioning Contractors of America

2800 Shirlington Road, Suite 300, Arlington, VA 22206 • 703.575.4477 • 703.575.4449 (F) • www.acca.org

March 1, 2018

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 Air Conditioning Contractors of America (ACCA), the national trade association representing more than 600,000 professional heating, ventilation, air conditioning, and refrigeration (HVACR) professionals in every state, thank Secretary Acosta and his team at the Department of Labor for your work to make Association Health Plans a viable option for our members. ACCA is pleased to submit these comments in response to the referenced Proposed Rule published in the January 6, 2018 *Federal Register*- RIN 1210-AB85.

ACCA's members design, install, and maintain the equipment our economy depends on to provide comfort, make modern medicine possible, keep our food fresh, and ensure our information systems are operational. For years ACCA has advocated for 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 and 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." ACCA and our members 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."

Employers Could Band Together for the Single Purpose of Obtaining Health Coverage
&
Revisions to the long-standing interpretation of what constitutes an "employer" capable of sponsoring an "employee benefit plan" under ERISA

ACCA was pleased to see the Proposed Rule appears to retain existing guidance regarding commonality-of-interest requirements. We also appreciate the DOL's acknowledgement that many business owners are, in structure and in practice, *employees* of their companies. ACCA 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, ACCA 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 employee 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. ACCA 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. ACCA 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. ACCA 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 and that this condition for eligibility be eliminated.

Written representation of an employment relationship. ACCA 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.

ACCA generally supports the nondiscrimination provisions included in the Proposed Rule. ACCA appreciates the clarification provided in the regulation on how the HIPAA nondiscrimination rules would apply in the context of an AHP. In addition, ACCA 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) 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. ACCA 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 ACCA. Under the current state regulatory system, ACCA does not believe we could currently 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, ACCA 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 ACCA 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.

ACCA appreciates the opportunity to work with the DOL team, and thank you for your consideration of ACCA's views. We strongly support the Association Health Plans, and believe if properly structured they could serve as a resource that will benefit America's small business owners, their employees all American's. If you have any questions, please contact me (703) 824-8841 or barton.james@acca.org.

Respectfully submitted,

Barton C. James
Senior Vice President of Government Relations
Air Conditioning Contractors of America