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The Honorable R. Alexander Acosta
Secretary of Labor
c/o Ms. Jeanne Klinefelter Wilson, Deputy Assistant Secretary
Office of Regulations and Interpretations,
Employee Benefits Security Administration
United States Department of Labor
200 Constitution Avenue N.W., Rm N-5655
Washington, DC 20210

RE: RIN 1210–AB85, Comments, *Definition of Employer under Section 3(5) of ERISA—Association Health Plans* 29 CFR 2510 (January 5, 2018)

This letter presents the comments of the International Foodservice Distributors Association ("IFDA") on the Proposed Rule "Definition of 'Employer' Under Section 3(5) of ERISA-Association Health Plans" 29 C.F.R. Part 2510, which was published by the Department of Labor (the "Department" or "DOL") on January 5, 2018 (the "Proposed Rule"). The Proposed Rule was issued by the Department pursuant to Executive Order 13813, *Promoting Healthcare Choice and Competition Across the United States,* which seeks to significantly expand access to more affordable health care options for millions of Americans (the "Executive Order").[1] The Proposed Rule will expand the ability of groups of employers to act as an "employer" under Section 3(5) of the Employee Retirement Income Security Act of 1974, as amended, ("ERISA") to establish and maintain an Association Health Plan ("AHP").

By way of background, IFDA is the trade association representing foodservice distributor throughout the United States and internationally. Whether you are having dinner at your favorite restaurant with family or friends, or grabbing breakfast on the go, the food you eat away from home was delivered by a foodservice distributor. IFDA members include broadline, systems, and specialty foodservice distributors that supply food and related products to professional kitchens from restaurants, colleges and universities, to hospitals and care facilities, hotels and resorts, and other foodservice operations. Our members operate more than 800 distribution facilities with more than $125 billion in annual sales.

IFDA provides research, educational opportunities, and business forums to its members to help foodservice distributors succeed. In addition, IFDA provides important representation on Capitol Hill and with the Administration, sharing the perspective of leading foodservice distributors with policymakers to shape the legislative and regulatory process. For many years, the Association has assisted its members regarding the development of their programs to comply with the broad range of

[1] 82 Fed. Reg. 48385.

federal and state regulatory requirements applicable to their businesses, including their substantial and important employment law compliance obligations. For the reasons described below, IFDA strongly supports the Proposed Rule expanding the definition of employer under Section 3(5) of ERISA to allow the establishment of AHPs.

1. Health coverage provided through an AHP will be more efficient and affordable for the employer members of the association.

The Affordable Care Act's small group rules have made providing health coverage more expensive and less flexible due to the inherent expense of smaller risk pools. As the Proposed rule accurately provides, "large employers 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." IFDA welcomes and supports the opportunity to provide coverage through a single, large group plan sponsored by an association of employers. AHPs will allow groups of employers to provide affordable coverage to employees of the employer members and reduce the burden of health plan compliance on individual employer members.

AHPs offer employers within the same "trade, industry, line of business or profession," the opportunity to provide affordable health coverage to hard working Americans by increasing the size of the risk pools and creating administrative efficiencies. The preamble to the Proposed Rule specifically provides that "treating health coverage sponsored by an employer association as a single group health plan may promote economies of scale, administrative efficiencies and transfer plan maintenance responsibilities from participating employers to the associations." AHP employer members will be able to leverage the economies of scale, and administrative efficiencies of their association networks to increase coverage for their employees.

2. IFDA supports the expansion of the definition of "employer" under Section 3(5) of ERISA to include AHPs.

The Proposed Rule expands the definition of "employer" under Section 3(5) of ERISA to make it easier for groups of employers to form associations for purposes of sponsoring a single "employer" welfare benefit plan. The current definition of "employer" under Section 3(5) of ERISA provides as follows: "any person acting directly as an employer; or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity."[2] In order for a group or association of employers to act in the capacity of such an "employer" for purposes of sponsoring a group health plan on behalf of employer-members, courts and Department advisory opinions have imposed certain requirements based on facts and circumstances, as follows:

First, the group of employers that establishes and maintains the group health plan must be a "bona fide association of employers tied by a common economic or representation interest, unrelated

[2] 29 U.S.C. 1002(5).

to the provision of benefits."[3] Additionally, the employer members of the organization that sponsors the group health plan must exercise control, either directly or indirectly, both in form and in substance, over the plan.[4] This test has been narrowly construed by the Department and left to state regulations.

The Proposed Rule expands the definition of a "bona fide association of employers" to include a group or association of employers that meets the following requirements: "…(5) The employer members have a commonality of interest as set forth in paragraph (c) of this section…" Paragraph (c) provides that the "commonality of interest" of the employer-members of the association "will be determined based on relevant facts and circumstances and may be established by: (1) Employers being in the same trade, industry, line of business or profession; or (2) Employers having a principal place of business in a region that does not exceed the boundaries of the same State or the same metropolitan area (even if the metropolitan area includes more than one State)." IFDA supports a broad interpretation of "commonality of interest" in order to maximize the impact of access to AHPs for small employers. The Department's definition in the Proposed Rule will provide AHPs the ability to provide affordable health coverage to employees of employer members of "trade, industry line or profession" across state lines or for groups of employers within a state or a city to form an AHP regardless of economic tie. In this regard, broadening the "commonality of interest" rule will allow larger risk pools, greater negotiation of rates and administrative efficiencies, each of which will exponentially increase the affordability and accessibility of health coverage for millions of American workers.

3. IFDA seeks clarification from the Department that the expanded definition of "employer" under Section 3(5) of ERISA allows AHPs to be treated as single employer plans and not Multiple Employer Welfare Arrangements ("MEWAs") subject to onerous state regulations.

In order for AHPs to effectively provide health coverage to association member employees, AHPs that satisfy the Department's regulatory requirements should effectively be treated as a single association plan "subject to the same State and Federal regulatory structure as other ERISA-covered employee welfare benefit plans." This will allow AHPs to operate as large, single employer plans with the flexibility to implement insured or self-insured funding mechanisms. IFDA supports the Department's position that by expanding the definition of "employer" under Section 3(5) of ERISA, AHPs will be considered "single employer" plans. IFDA seeks clarification that AHPs will not be considered MEWAs subject to onerous and complicated state regulations. As stated in the request for comments to the Proposed Rule, the Department is making a "revision to its long-standing interpretation of what constitutes an 'employer' capable of sponsoring an 'employee benefit plan' under ERISA in the context of group health coverage. Under the proposal, AHPs that meet the regulation's conditions would have a ready means of offering their employer-members, and their employer-members' employees, a single group health plan subject to the same State and Federal regulatory structure as other ERISA-covered employee welfare benefit plans."

[3] *Wisconsin Educ. Ass'n Trust v. Iowa State Bd.*, 804 F.2d 1059, 1063 (8th Cir.1986).
[4] See DOL Op. No. 96–25A ("[I]t is the Department's view that the employers that participate in a benefit program must, either directly or indirectly, exercise control over the program, both in form and substance, to act as a bona fide employer group or association with respect to the program.").

This interpretation will allow AHPs to operate as single, large group plans in either an insured or self-insured capacity. It provides AHPs the flexibility to meet the health care coverage needs of the employer member employee populations, provide substantial economic savings and reduce the administrative burdens of maintaining small group plans. However, in order for AHPs to be implemented in a manner that will have the greatest impact for small business employees in the United States, AHPs must be able provide coverage to employer-members in various states free from onerous MEWA and insurance regulations.

In past decades MEWAs were the subject of rampant fraud and abuse, leaving a wake of uninsured participants and large, unpaid health care claims. States reacted by enacting strict and formidable funding and registration requirements for MEWAs. Due to the impact of these regulations, MEWAs have effectively been eliminated.[5] Therefore, AHPs should be subject to the statutory and regulatory requirements of ERISA and not the myriad of individual state MEWA rules. ERISA provides the regulatory framework governing employer-sponsored benefits in the United States. The purpose of ERISA is to "protect…the interests of participants in employee benefits and the beneficiaries by setting out substantive regulatory requirements for employee benefit plans...."[6] The Supreme Court has reiterated the statutory authority of ERISA with respect to employee benefit regulation.[7] IFDA supports the Department's position that AHPs will be "single employer" plans and not otherwise considered MEWAs.

4. The Proposed Rule's nondiscrimination requirements will promote large and diverse risk pools and protect against "cherry-picking" health populations.

The Proposed Rule provides that an AHP may not condition employer membership based on the health factors of any current or former employees of the employer-members (or any employee's family member or other beneficiary). Federal requirements under the Affordable Care Act and the Health Insurance Portability and Accountability Act prohibit discrimination within groups of similarly situated employees in the provision of health care coverage, but not across different groups of similarly situated individuals. Permitted classification is allowed based on bona fide employment-based classification such as part-time or full-time employment status. The Proposed Rule does not relieve AHPs from these requirements and does not allow associations to treat different employer-members as different bona fide employment-based classifications (i.e., no employer-by-employer risk rating). IFDA supports this requirement because it protects against AHPs cherry-picking only healthy employee populations, which would defeat the purpose of spreading risk among larger diverse populations. The Proposed Rule strikes the right balance between risk selection issues with the stability of the AHP market.

[5] By way of example, Texas has five (5) registered MEWAs, Montana has eleven (11), California has four (4) and Georgia has no registered MEWAs.

[6] 29 U.S.C. § 1001(b).

[7] "ERISA is a comprehensive federal law designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, Inc.* 463 U.S. 85, 90 (1983).

Conclusion

IFDA strongly supports the Proposed Rule expanding access to AHPs for reasons set forth in this letter. We appreciate the opportunity to submit comments on this matter.

Respectfully submitted,

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