March 5, 2018

Via Electronic Submission: www.regulations.gov

Mr. Joe Canary, Office Director
Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

RE: RIN: 1210-AB85; Notice of Proposed Rulemaking (NPRM): Definition of "Employer" under Section 3(5) of ERISA –Association Health Plans

Dear Mr. Canary:

The National Restaurant Association ("Association") submits these comments in response to the Department of Labor's ("Department" or "DOL") Proposed Rule, as published in the Federal Register on January 5, 2018 regarding the Definition of "Employer" under Section 3(5) of ERISA – Association Health Plans ("AHP").

The National Restaurant Association is the leading business association for the restaurant and foodservice industry, representing more than 14.7 million employees, nearly 10 percent of the nation's workforce. With one million locations across the country, the $798.7 billion in sales from the restaurant industry makes up four percent of the U.S. GDP.

The restaurant industry is a job creator, expecting to generate nearly $800 billion in direct revenue in the U.S. in 2017, and our industry is uniquely situated in every community across the country reaching millions of Americans, and a critical societal gateway into professional services and management. Indeed, nearly half of all adults in the U.S. have worked in a restaurant, and 1 in 3 Americans worked their first job in the restaurant industry.

Moreover, the restaurant industry is 90% small businesses, serving local communities and neighborhoods, each with their own micro-economic profile, wage scale and benefits, labor skills and availability, as well as other localized costs and revenues. Even large regional and national restaurant companies consist of franchises that reflect the character of the neighborhood, population and economy of the community in which they are located. Our small business members have experienced the same difficulties obtaining health insurance as other industries. Small businesses offering health insurance

have declined from an average of 63% in the ten years preceding the Patient Protection and Affordable Care Act ("PPACA") to 56% in 2016.[1]

Recognizing this gap in our industry, specifically for small business owners, the Association sponsored the creation of the fully insured Restaurant & Hospitality Association Benefit Trust ("RHABT") under existing ERISA law and the Department's five regulatory guidelines, which include the following: (1) The RHABT was formed by the Association which will be celebrating its 100th anniversary in 2019. (2) The RHABT and its Association members are tied by common economic and representational interests. (3) The RHABT is designed to be controlled by its participating members in form and substance. According to its articles, "…Trustee(s) shall be elected and ratified by a majority of the participating members." Furthermore, "… only an owner or officer of a participating member may be elected as a Trustee." (4) The Trustees operate pursuant to a formal written governance structure. (5) The RHABT does not permit sole proprietors to participate.

The Restaurant & Hospitality Association Benefit Trust was formed in November 2017 after two years of effort – expending significant internal resources, and working with outside experts and the insurance carrier – to create an offering that can: (a) reduce health insurance premiums for Association members, (b) be scalable and sustainable in the long-term, and (c) does not create excessive risk for the insurance carrier. The difficulty, time, and expense of our experience creating an AHP, under existing law and regulatory guidance, is a testament to the need for regulatory relief.

As such, the Association welcomes Executive Order 13813, "Promoting Healthcare Choice and Competition Across the United States,"[2] directing the Department to revisit the regulations regarding AHPs to: (a) expand the availability of, and access to, alternatives to expensive, mandate-laden PPACA insurance, including AHPs, Short-Term Limited-Duration Insurance (STLDI), and Health Reimbursement Arrangements (HRAs); (b) re-inject competition by lowering barriers to entry, limiting excessive consolidation and preventing abuses of market power; (c) improve access to, and the quality of, information that Americans need to make informed healthcare decisions, including data about healthcare prices and outcomes, while minimizing reporting burdens on affected plans, providers, or payers.

We applaud the Department's endeavor to execute the Executive Order and accomplish its three goals. Having recently launched the RHABT we can validate the difficulties in establishing an AHP and are excited how regulatory relief could potentially benefit our members. Allowing small businesses to gain the economies of scale and same benefit requirements as large employers will allow them to offer more affordable coverage to more employees and compete for talent on a level playing field.

While the proposed rule offers some regulatory relief, certain components of the proposed rule would dramatically increase regulatory requirements. The net effect results in a proposed rule diametrically opposed to the spirit and goal of the Executive Order. We appreciate this opportunity to highlight the concerns so this can be avoided.

The issues involved are complex, and we appreciate the opportunity to provide comments which may help clarify and strengthen the proposed rule. The Department has requested comments on:

[1] Kaiser Family Foundation, *Employer Health Benefits Annual Survey (2016),* Exhibit H
[2] Presidential Executive Order 13813 issued October 12, 2017

(a) Allowing employers to band together for the express purpose of offering healthcare coverage if they are: (1) in the same trade, industry, line of business or profession; or (2) have a principal place of business within a region that does not exceed the boundaries of the same State or the same metropolitan area. The Association supports this proposed rule as a common-sense definition.

(b) The group or association must have an organizational structure and be functionally controlled by employer members. The Association supports this rule. This is acritical protection to mitigate profiteers and fraudsters from taking advantage of the new rules, to the detriment of employer members and their employees and families.

(c) Group or association plan coverage must be limited to employees of employer members and treatment of working owners. The Association supports expanding the definition of employer to include sole proprietors. Many restaurants initially start out as caterers, food trucks, delivery only, or takeout locations where the owner is the only fulltime employee. There are 305,000 small businesses[3] in our industry who would benefit from improved access to health insurance. Allowing single owners to participate in an AHP will support the success of small businesses by reducing a barrier to expanding a startup business. As an owner grows their business and income they move from the subsidized individual market to the unsubsidized market. While the subsidized individual market appears to be stabilizing, the same cannot be said in the unsubsidized market.[4] 2018 rates in the individual market increased from 17% - 32% depending on metallic level.[5] Furthermore, a survey by eHealth[6] found that 29% of individuals and 54% of families did not meet government affordability standards. Not coincidentally, the income level for that failure matched the ACA income subsidy limit.

Association Health Plans can serve a vital role as a source of health insurance coverage for businesses where the owners are making just enough money to lose subsidies but not enough to offer coverage to more employees. This is a critical stage in a small business moving from subsistence to expansion and the cost of health insurance can inhibit or delay the expansion.

Our support for this component is contingent on changes to the proposed health non-discrimination rules below in Section (d) 4. The unsubsidized individual market is poorly functioning and likely entering a death spiral as noted above. It is illogical to apply the same rules from a non-functioning market and expect different results. Moreover, it is highly unlikely that an AHP would enter this segment under those rules. If the Department desires to support small business creation and expansion, it must oversee a regulatory environment that supports, rather than hinders, that goal.

(d) Health nondiscrimination protections. This section appears to consider only the under 50 segment by significantly expanding regulations for employer by employer rating to the detriment of the over 51+ market. This would be a significant and unwarranted expansion of existing Department regulations.

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[3] United States Census Bureau Non-Employer Statistics Program, 2015

[4] Robert Laszewski, National Review, "*Is Part of the Health Insurance Market Entering a Death Spiral?,*" August 3, 2017

[5] Ashley Semanskee, Gary Claxton, and Larry Levitt, "*How Premiums are Changing in 2018,*" Kaiser Family Foundation, November 14, 2017

[6] eHealth, "*Obamacare Premiums will be Officially Unaffordable in 2018,*" June 22, 2017

1. Paragraph d(1) of the proposed regulation would ensure the group or association does not restrict membership in the association itself based on any health factor. Our Association supports this regulation.
2. Paragraph d(2) of the proposed regulation would ensure the groups or Association comply with Section 2590.702(b) in regards to eligibility for benefits. The Association supports this regulation as a logical protection for employees.
3. Paragraphs d(3) and d(4) are a significant and unwarranted expansion of existing Department regulations which as currently written undermine the goals of the Executive Order. Paragraph 5 p. 624 in the Background portion appears to interpret the regulatory change expanding the definition of commonality to therefore require a change in nondiscrimination. DOL states "Coupled with the control requirement, also requiring AHPs to accept all employers who fit their geographic, industry, or any other non-health-based selection criteria that each AHP chooses. The non-discrimination provisions ensure a level of cohesion and commonality…" The entire proposed ruling up to this point establishes the level of cohesion and commonality necessary to differentiate an AHP versus a commercial insurance company. The Department at this point proposes subjecting AHPs to the expanded regulatory requirement as a commercial insurance company to distinguish them from being a commercial insurance company.
   Furthermore, the Department's logic in extending the non-discrimination requirements to limit employer-by-employer risk rating because it undermines "acting in the interest of employers" is flawed.

   - AHPs by regulation are run by and for the benefit of the employer members. It is illogical to say that an entity run by and for the benefit of employer members is not acting in the interests of said employer members for any pricing model utilized.

   - The Department further errs in treating employers as similarly situated individual employees, despite critical factual differences in the ability of employers to obtain health insurance versus individuals. Employers have choices in the market for health insurance that are fundamentally different from individual employees.

     Individual employees have three choices for health insurance: (1) heavily subsidized employer coverage, (2) very expensive, unsubsidized individual coverage because the employer has made an offer, which eliminates the option for subsidized individual coverage, and (3) forgoing health insurance. Individual employees benefit from non-discrimination because they effectively do not have a choice, other than the employer's offered coverage.

     Employers, in contrast, have many choices in the marketplace where they can switch vendors if they do not like pricing, service, networks, benefit levels or wellness program options. Many employers make this switch on an annual basis. The ability to change vendors is a critical distinction for why it is incorrect to expand this regulation from individual employees to employers.

- Furthermore, the Department's proposed expansion would not create an environment where the individual employees are actually paying the same rates as imagined, in expanding the similarly situated regulations to employers. While the employers may receive the same rate, due to varying employer contribution levels, individual employees would not be paying the same amounts. Therefore, the Department proposes an environment where "similarly situated" individual employees at firm A could be paying up to 100% more than individual employees at firm B. This scenario could expose firms and AHPs to lawsuits for violating ERISA. The Department could add a proviso stating this is not an ERISA violation. However, if the Department were to do so, it would be admitting that the reason for this regulatory expansion has nothing to do with protecting individual employees, which is the purpose of 2590.702

The proposed non-discrimination rules would destabilize the existing AHP 51+ segment by creating adverse selection. The existing 51+ segment allows insurance carriers to vary premiums by employer whereas AHPs must offer the same rate to all employers. This creates a structure where less healthy employers gravitate to AHPs driving up costs for remaining members. The resulting cost increases would limit the ability of AHPs to attract moderately healthy groups and eventually making the AHP pricing uncompetitive. This would have the effect of forcing existing AHPs out of business or exiting the 51+ segment – both which have the effect of increasing consolidation in the marketplace and decreasing competition.

The proposed non-discrimination rules, specifically for varying premiums, would effectively eliminate the creation of any startup AHPs and jeopardize the viability of existing AHPs. Our experience in securing an insurance carrier was extremely difficult. The Association was in a unique situation, where an existing program gave our carrier the confidence it could correctly underwrite groups, even though the AHP was a startup. Other Associations do not have this type of program to leverage for an experience proxy. A startup's lack of experience, combined with onerous non-discrimination rules, would make carriers even less likely to support a new AHP. The proposed rules, written as is, would discourage insurance carriers from offering fully insured coverage to new AHPs. The RFI on self-insurance, as written, would eliminate the option of self-insuring. This would make it very difficult to form a new AHP and drive many existing ones out of business.

Further Suggestions for the Department's Consideration:

Grandfather Existing Multiple Employer Welfare Arrangements ("MEWAs") /AHPs

If the Department publishes the final rule, in substantially the same form, there needs to be a clearly stated option for existing MEWAs/AHPs to be grandfathered into the current regulatory structure. As outlined above the proposed rules would likely put many existing AHPs out of business. Reducing choice and competition in the market is the exact opposite of the Executive Order. An option needs to be in place where existing AHPs can choose to use the new or previous structure. This would protect existing AHPs and, at a minimum, help ensure that the proposed rule does no harm. We hope that the Department foresaw this concern, as it noted on page 616 of its Summary "Rather than constricting the offerings on such non-plan multiple employer welfare arrangements (MEWAs), the proposed rule would simply make

more widely available another vehicle – the AHP …" This is in contrast to the first sentence on p. 33 "However, if the proposed rule is adopted as a final rule, upon effectiveness of the final rule, such an existing AHP would need to meet all the conditions in the final rule to continue to act as an ERISA section 3(5) employer going forward."

Promote transparency vs regulation

Transparency to employers and consumers is critical to ensuring the tradeoff between premium reductions and benefit/financial protection reductions is clearly understood. Concerns were raised at the Senate HELP Roundtable that employers may not understand the differences between PPACA compliant coverage in the under 50 segment and potential AHP offerings. To mitigate this potential issue the Association would support the creation of a simple, standard disclosure form that clearly states in plain language any differences in benefit coverage to Essential Health Benefits and if financial limits are higher than the PPACA limits.

To enable smooth interstate operations, proposed rule should clearly state the preemption of state health insurance law.

The proposed rule expressly provides for AHPs to be regulated as a MEWA at the state level. The Department has been granted the authority to balance states' interest in benefits being paid with Congress' intent to smooth interstate operations by limiting conflicting state demands. An industry or trade association AHP will most likely operate nationally or at least across several state boundaries. Requiring the AHP to comply with each state's requirements puts the small businesses it represents at a disadvantage to large employers operating in the same states. The proposed rule would increase the regulatory burden on an AHP and potentially the operating costs as multiple versions of the same plans are offered in various states. It is logical to allow the home state of the AHP to reasonably regulate the AHP as a fully insured large employer and/or self-insured employer with size, capitalization and reserve requirements. Single state control and clear preemption will create an effective and predictable regulatory environment similar to one experienced by large employers. This preserves the historical strong and important role of state insurance oversight while reducing the regulatory burden on AHPs. From a practical perspective, this particularly makes sense for a fully insured AHP where an insurance company is responsible for the payment of benefits, even if the AHP goes out of business.

Thank you for the opportunity to comment on the Proposed Rule to expand access to health coverage by allowing more employers to form AHPs and the Request for Information on self-insurance. We look forward to working with the Department on these critical issues.

Respectfully submitted,

Clinton Wolf
Senior Vice President, Health and Insurance Services
National Restaurant Association