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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)

Dear Mr. Secretary:

Job Creators Network ("JCN") submits these comments to the Proposed Rule "Definition of 'Employer' Under Section 3(5) of ERISA-Association Health Plans" 29 CFR 2510 by the Department of Labor (the "Department" or "DOL") published on January 5, 2018 (the "Proposed Rule"). The Proposed Rule expands the conditions that a group of employers must satisfy to act as an ''employer'' under the Employee Retirement Income Security Act of 1974, as amended ("ERISA") for purposes of sponsoring an Association Health Plan ("AHP"). The Proposed Rule was issued pursuant to Executive Order 13813, *Promoting Healthcare Choice and Competition Across the United States*, with the intent to expand access to more affordable health care options for millions of Americans (the "Executive Order").[1]

JCN is a nonpartisan organization whose mission is to educate employees of "Main Street America", and serve and protect the 85 million people who depend on the success of small businesses.

JCN provides business leaders and entrepreneurs with the tools to become the voice of free enterprise in the media, in Congress, in state capitals, in their communities, and their workplaces. Small businesses do not always have the resources to respond to the many administrative and human resources challenges that arise on a daily basis. JCN advocates for the resources and flexibility small businesses need to succeed and thrive on a state and national level. JCN has employer-members across the country.

JCN's work strengthens the small business backbone of the economy. Small businesses account for nearly two-thirds of new jobs and half of all jobs. According to the most recent

[1] 82 Fed. Reg. 48385.

Small Business Administration data[2], there are 29.6 million small businesses in the country, 5.8 million of which have employees. Nearly half of all small businesses are women-owned, one-third are minority-owned, and almost ten percent are owned by veterans. Small businesses produce close to half of the United States Gross Domestic Product and generate most new innovations.

However, small businesses have been disproportionately hurt by rising health care costs. According to several recent national surveys of small business owners, health care costs are cited as the biggest or one of the biggest hurdles they face. Small businesses lack the scale necessary to negotiate less expensive health care plans from providers. Because of their smaller size, they are also more risky to insure, meaning they face higher premium costs. In addition, their smaller profit margins reduce their ability to absorb increasing health care costs. The high cost of health care acts as a strong disincentive to small business creation and expansion.

Therefore, JCN supports and applauds the Executive Order and the Department's issuance of the Proposed Rule expanding the definition of "employer" under Section 3(5) of ERISA to allow for the formation of AHPs and increased access to health coverage for millions of small business employees. JCN and its members know far too well the reality that "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." Compared to large employers, small businesses bear a much larger financial and administrative burden when providing quality benefits for their employees.

AHPs offer small business owners an opportunity to join together with other small businesses to provide health insurance to hard working Americans who desperately need quality and affordable coverage. JCN looks forward to the opportunity provided by the Proposed Rule to help small businesses provide access to high-quality, affordable health care coverage to their employees through AHPs.

Summary of Comments

1. Data demonstrates the need for a solution to the high costs and administrative burden that prevents small businesses from providing high-quality, affordable health insurance to American workers.

2. The Employee Benefit Security Administration ("EBSA") under the Department has jurisdiction and authority to interpret Title I of ERISA. The Department has been directed to propose regulations or revise guidance to expand access to health coverage by allowing more employers to form AHPs.

[2] Small Business Association Office of Advocacy, "Frequently Asked Questions," August 2017. https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2017-WEB.pdf

3. JCN is a strong proponent of a broad interpretation of the definition "commonality of interest" to allow for the creation of AHPs with large and diverse risk pools.

4. JCN asks the Department for specific clarification that the expanded definition of "employer" under Section 3(5) of ERISA will allow AHPs to be treated as single employer plans that are not subject to state Multiple Employer Welfare Arrangement ("MEWA") regulations.

5. JCN supports the Proposed Rule's inclusion of owner-workers as eligible participants in an AHP.

6. The health status nondiscrimination protections in the Proposed Rule protect against risk pool stacking and strike the right balance.

7. Associations that sponsor AHPs have incentive to provide quality benefit options.

Specific Comments

1. Data demonstrates the need for a solution to the high costs and administrative burden that prevents small businesses from providing high-quality, affordable health insurance to American workers.

Small group market rules under the Affordable Care Act ("ACA") make it more difficult for small businesses to provide affordable health insurance because, without the purchasing power of a large group, the insurance companies charge higher rates for smaller risk pools.

According to a Kaiser Family Foundation study, small employers are much less likely to offer health insurance to their employees than large employers:

- 98% of large employers (200+ employees) offer health coverage to at least some of their employees.
- Only 61% of employers with less than 200 employees offer health coverage to at least some of their employees.

Pursuant to the study, in 2012, 48% of small employers not offering coverage cited that *the cost of health insurance* was the primary reason for not offering health benefits.[3]

Other more recent data supports the trend that small employers struggle to provide health care to their employees.

For the period between 2008 and 2015[4]:

[3] Kaiser/HRET Survey of Employer-sponsored Health Benefits 2012.
[4] Fronstin, Paul *Fewer Small Employers Offering Health Coverage, Large Employers Hold Steady,* EBRI Notes Vol. 37, No. 8, July 2016.

- Employers with fewer than 10 employees providing health coverage dropped from 35.6% to 22.7% (a 36% decline).
- Employers with 10-24 employees providing health coverage dropped from 66.1% to 48.9% (26% decline).
- Employers with 25-99 employees providing health coverage dropped from 81.3% to 73.5% (10% decline).

While employer-sponsored coverage remains the most common source of healthcare coverage in the United States, a smaller proportion of people are covered by employers than a decade ago.[5]

Small and large businesses vary substantially on health insurance offer rates and costs. Small businesses are much less likely to offer coverage, and there are important differences in the health benefits that they do offer. Employees of small businesses are responsible for paying both a larger share of family premiums as well as higher cost sharing amounts than employees of large businesses.[6]

AHPs offer a workable and much needed solution for small businesses to offer quality and affordable health coverage to their employees.

2. The Department has the authority, as directed by the Executive Order, to expand access to regulate AHPs.

In the United States, more than half of all Americans receive health insurance coverage through their employers. ERISA provides the regulatory framework governing employer-sponsored benefits, such as health insurance and retirement benefits. The purpose of ERISA is to "protect…the interests of participants in employee benefits and their beneficiaries by setting out substantive regulatory requirements for employee benefit plans...."[7] The Supreme Court has reiterated the statutory authority of ERISA with respect to employee benefit regulation. [8]

The Executive Order directs the DOL to consider issuing regulations that will expand access to more affordable health coverage by permitting more employers to form AHPs. The Secretary has been specifically directed to consider expanding the conditions that a group of employers must satisfy to act as an "employer" under ERISA Section 3(5) for purposes of sponsoring a group health plan by reconsidering the "commonality of interest" requirements under current Departmental guidance.

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[5] Michelle Long, Matthew Rae, and Gary Claxton *A Comparison of the Availability and Cost of Coverage for Workers in Small Firms and Large Firms: Update from the 2015 Employer Health Benefits Survey* February 05, 2016, Kaiser Family Foundation.

[6] Michelle Long, Matthew Rae, Gary Claxton, and Anthony Damico, *Trends in Employer-Sponsored Insurance Offer and Coverage Rates, 1999-2014,* March 21, 2016, Kaiser Family Foundation.

[7] 29 U.S.C. § 1001(b).

[8] "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).

In the case of statutory and regulatory provisions such as those involved here, the DOL has the authority to supersede its previous interpretations, as articulated in non-binding advisory opinions, to address marketplace developments and new policy and regulatory issues.[9]

JCN requests that the Department use its inherent authority under ERISA as directed by the President to provide a consistent regulatory framework that will promote access to AHPs for small businesses and their employees nationwide.

3. JCN is a strong proponent of a broad interpretation of the definition "commonality of interest" to allow for the creation of AHPs with large and diverse risk pools.

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."[10] 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 to the provision of benefits."[11] 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.[12]

The Proposed Rule sets forth that for "purposes of Title I of the Act and this chapter, a bona fide group or association of employers capable of establishing a group health plan that is an employer welfare benefit plan shall 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)."

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[9] See, generally, *Perez v. Mortgage Bankers Assn*, 135 S. Ct. 1199 (2015).
[10] 29 U.S.C. 1002(5).
[11] *Wisconsin Educ. Ass'n Trust v. Iowa State Bd*., 804 F.2d 1059, 1063 (8th Cir.1986).
[12] 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.").

JCN urges the Department to consider a broad interpretation of "commonality of interest" so as to include as many small employers across industry sectors as possible with the understanding that there must be some business nexus that will limit the participation to groups of employers with a common tie. For example, small businesses with less than 100 employees should be considered to have sufficient "commonality of interest" across industry sectors for purposes of sponsoring AHPs. Small businesses operating within a recognized industry or trade such as the retail industry, manufacturing, or real estate brokers should also have sufficient "commonality of interest" to establish and maintain AHPs.

Bona fide associations like JCN are formed to support small businesses across industry sectors because its members face the same administrative, logistical and employment relationship challenges regardless of industry, line of business or profession. In this regard, broadening the "commonality of interest" rule across the industry sectors will allow larger risk pools, greater negotiation of rates and administrative efficiencies, each of which will exponentially increase the affordability and accessibility of health insurance to working Americans who need it the most.

The Proposed Rule provides the opportunity for groups of employers to form associations explicitly for the purpose of sponsoring AHPs. This will allow new associations to provide access to high-quality, affordable health coverage for employees of small businesses as intended by the Executive Order. The Proposed Rule requires an AHP to have "a formal organizational structure with a governing body… and by-laws or other similar indications of formality." This formal structure will provide the newly formed AHPs with the organizational tools and safeguards to quickly effectuate access to health coverage for small businesses and their employees.

The preamble to the Proposed Rule specifically states 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." The need and desire for expanded access to health coverage through AHPs is paramount for small businesses who can leverage the economies of scale and administrative efficiencies of AHPs to provide high-quality health coverage to their employees.

In summary, JCN encourages the Department to interpret "commonality of interest" broadly to maximize access to AHPs in accordance with the policy objectives of the President and the Proposed Rule.

4. JCN asks the Department for specific clarification that the expanded definition of "employer" under Section 3(5) of ERISA will allow AHPs to be treated as single employer plans that are not subject to state MEWA regulations.

In order for AHPs to effectively provide high-quality, affordable health insurance to association member employees, AHPs that satisfy the regulatory scheme 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." JCN asks the Department for clarification that, by expanding the definition of "employer" under Section 3(5) of ERISA, AHPs will be considered "single employer" plans and not 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.*"

This approach will allow AHPs to operate as single large group plans in either an insured or self-insured capacity which will afford AHPs the flexibility to meet the health care coverage needs of the participating employee populations, provide substantial economic savings and reduce the administrative burdens of maintaining small group plans. The treatment of AHPs as single, large group plans also accomplishes the significant Presidential goal of providing high-quality, affordable health coverage across state lines. JCN is poised to help facilitate and implement AHPs in a manner that will have the greatest impact for small business employees in the United States. In order to do so, AHPs must be able provide coverage to employer-members in various states without the strangle hold of individual state MEWA and insurance requirements.

JCN recognizes the need for mechanisms to support sufficient reserve funding and actuarial soundness of AHPs and supports a regulatory scheme to ensure reserves and financial and administrative safeguards for the protection of the AHP benefits. In past decades, unscrupulous promoters took advantage of the lack of federal and state regulations to sell self-insured MEWA plans to small employers without sufficient funding and reserves. These promoters took the premiums and failed to pay the benefits. In the wake of such schemes, the states were faced with uninsured participants and large, unpaid health care expenses. Accordingly, almost all states enacted onerous and oppressive funding and registration requirements to prevent such fraud and abuse. MEWAs have effectively been eliminated by state regulation. By way of example, Texas has five (5) registered MEWAs, Montana has eleven (11), California has four (4) and Georgia has no registered MEWAs.

If AHPs are subject to state MEWA requirements, AHPs will be limited to fully-insured arrangements within state boundaries. The only way to maximize the impact and reach of AHPs will be to allow AHPs the flexibility to self-insure and provide health coverage to employee members in different states. Under this scenario, AHPs will be subject to the same regulatory requirements under ERISA which are applicable to all employer sponsored welfare benefit plans. As noted above, ERISA was enacted to "protect…the interests of participants in employee benefits and their beneficiaries by setting out substantive regulatory requirements for employee benefit plans...."[13] It would be antithetical to this purpose if small employers are treated differently than large employers

[13] 29 U.S.C. § 1001(b).

in the activity of providing health coverage to their employees. As such, allowing AHPs to function under the same regulatory requirements as large employer plans will "level the playing field" in providing high-quality, affordable health coverage to the employees of small businesses.

5. JCN supports the Proposed Rule's inclusion of owner-workers as eligible participants in an AHP.

Owner-workers with businesses who do not have employees have limited access to health coverage through the individual market and health care exchanges as they are currently unable to sponsor health plans under ERISA. ERISA governs plans for "employees".[14] If an owner-worker has employees, he or she may participate in a plan sponsored by the business he or she owns and is treated as having a "dual status".[15] It stands to reason, then, that an owner-worker should be allowed to participate in an AHP as both an employer and employee. JCN supports the inclusion of owner-workers as eligible to participate in AHPs and the amendment to the regulations set forth in 29 CFR 2510.3-3(c) to cross reference the Proposed Rule. Owner-workers that contribute to the United States economy and earn income from their trade or business do not work less hard than employees of large companies, and, in fact, work without the support and resources large employers provide. AHPs offer owner-workers the opportunity to access health coverage while minimizing the expense and administrative burden that have traditionally been a barrier to coverage.

6. The health status nondiscrimination protections in the Proposed Rule protect against risk pool stacking and strike the right balance.

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). HIPAA and ACA rules prohibit discrimination *within* groups of similarly situated employees, 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 would not allow associations to treat different employer-members as different bona fide employment-based classifications (i.e., no employer-by-employer risk rating). JCN supports this requirement because it protects against AHPs cherry-picking only healthy employee populations, which JCN acknowledges 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.

7. Associations that sponsor AHPs have incentive to provide quality benefit options

JCN believes that treating AHPs as large group plans which are not subject to the minimum essential health benefit requirements of the ACA will not create a flood of "skinny"

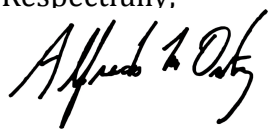
[14] 29 CFR 2510.3-3.
[15] *Yates v. Hendon*, 541 U.S. 1 (2004).

coverage plans. Despite no requirement to offer essential health benefits, large self-insured health plans continue to do so because offering such benefits provides high-quality, affordable health coverage to employees with a larger risk pool. Essential health benefits include, among other things, coverage for ambulance service, emergency room visits, preventive care, prescription drugs and laboratory tests. Providing a "skinny" plan would not be competitive for AHPs because such essential health benefits will be affordable if provided through a large group plan. In the past, small group plans could not always afford to provide such coverage because smaller plans are more expensive, and in order to provide any benefits at all certain benefits had to be eliminated. The larger the plan, the less expensive it will be to provide a large range of benefits. To that end, associations such as JCN would have no incentive to risk the good will of their members by providing plans without adequate coverage.

Conclusion

Pursuant to the comments set forth in this letter, JCN enthusiastically supports the Proposed Rule expanding access to AHPs. Thank you for the opportunity to submit these comments.

Respectfully,



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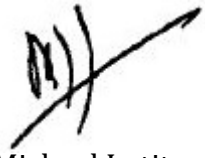

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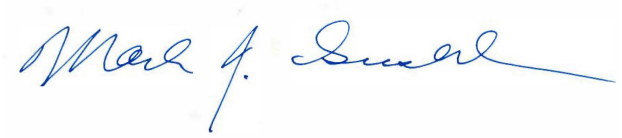

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