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March 6, 2018

Joe Canary, Director
U.S. Department of Labor
Employee Benefits Security Administration
Office of Regulations and Interpretations
200 Constitution Avenue NW
Washington, DC 20210

Re: **Comments on Proposed Rule: Definition of "Employer" Under Section 3(5) of ERISA – Association Health Plans, 83 Fed. Reg. 614 (Jan. 5, 2018), RIN 1210-AB85**

Dear Director Canary:

This comment describes my concerns with the Proposed Rule seeking to change the definition of "Employer" under Section 3(5) of ERISA – Association Health Plans. While I appreciate the stated intent of Executive Order 13813 and this Proposed Rule to "expand access to more affordable coverage,"[1] this proposal would fail to achieve that intent.

As Attorney General of Washington, I have consistently defended the Patient Protection and Affordable Care Act (ACA). The ACA established critical consumer protections to ensure Americans greater access to affordable health care. More than 200,000 Washingtonians are currently enrolled in ACA health insurance plans. It is critical that action by the Department of Labor (Department) does not undermine or eliminate reforms created by the ACA that are saving lives and providing basic health care protections and security to Washingtonians.

In comments submitted today (hereafter state Attorneys General comments), a coalition of Attorneys General, led by New York Attorney General Eric Schneiderman and Massachusetts Attorney General Maura Healey, assert that the Department lacks the legal authority to adopt the Proposed Rule. I concur with my fellow Attorneys General that "the Proposed Rule is an unlawful attempt to accomplish by executive rulemaking changes in law and policy that lie within the power of Congress – and that Congress has refused or failed to adopt." Like them, I request that the Proposed Rule be withdrawn.

[1] Federal Register, Vol. 83, No. 4, January 5, 2018, p. 615.

The impact of the Proposed Rule is far-reaching. If adopted, the Rule would cause significant damage to the Washington insurance market and pose a serious threat to Washington consumers. It is critically important that the issues described in this letter are addressed before finalizing the Proposed Rule. In addition, I request that the Department hold a public hearing on the Proposed Rule before taking this process any further.

- **The Proposed Rule would violate the Administrative Procedure Act.**

For the reasons set forth in the state Attorneys General comments, the Proposed Rule, if adopted, is contrary to law and inconsistent with requirements of the Administrative Procedure Act (APA) in multiple ways. The Department's proposed interpretation of "bona fide association" conflicts with longstanding caselaw interpreting the provisions of the Employee Retirement Income Security Act (ERISA). Consequently the Rule would be contrary to law and in excess of statutory jurisdiction under the APA.

Furthermore, the Department's proposed interpretation is contrary to its own longstanding interpretation of law. Such a change would result in searching judicial review and would likely be arbitrary and capricious. In particular, I reiterate the concerns raised by my fellow Attorneys General that (i) the Proposed Rule's new "Commonality of Interest" and "Control" requirements are contrary to ERISA, (ii) the Department does not offer reasoned, evidence-based rationales for reversing its longstanding position, (iii) the Department's failure to include any quantitative analysis of the costs and benefits of the Proposed Rule is unjustifiable; and (iv) the Proposed Rule's dual treatment of sole proprietors as both employers and employees is contrary to ERISA and unsupported by reason or evidence.

- **The Proposed Rule threatens Washington consumers by weakening the structural safeguards against fraud and abuse.**

Because of historical problems with consumer fraud associated with Multiple Employer Welfare Arrangements (MEWAs) in national health care markets, Washington has a unique statutory framework that limits the operation of new MEWAs to the fully insured market. *See* RCW Ch. 48.125. Association Health Plans are a subset of MEWAs. For the reasons stated in the state Attorneys General comments, I am concerned that the Proposed Rule would invite fraud and wrongdoing into Washington. This is something that our State Legislature has carefully acted to prevent. I share the concern of my fellow Attorneys General that "by relaxing the 'bona fide association' requirement to allow unrelated employers to associate solely for health benefit purposes, the Proposed Rule would encourage fly-by-night associations to form, engage in misconduct, and disappear with employees' premiums."

Although the Washington State Insurance Commissioner has enforcement authority to take action to regulate actual fraud and abuse by authorized and unauthorized actors who hold themselves out as insurers, this rule could open the door to allowing significant harm to be inflicted on unsophisticated purchasers before the Commissioner has the opportunity to exercise his enforcement authority.

I also share their conclusion that the Proposed Rule would further weaken protections against fraud and mismanagement by allowing individuals who purport to own a business to join Association Health Plans (AHPs) as employers even though they have no employees (working owners). 83 Fed. Reg. 636. Allowing members whose primary concern is simply getting cheaper insurance, rather than providing a meaningful and competitive benefit to their employees, could skew the very way associations design and search for carriers to provide plans.

- **The Proposed Rule would lead to segmentation of the insurance market.**

The Proposed Rule allows AHPs to avoid many of the coverage and consumer protection requirements in the ACA. Because the rule allows associations to offer their members much less meaningful coverage, the stripped down coverage they offer can be much cheaper. This cheaper coverage, coupled with the expansion to include self-employed individuals, is likely to incentivize younger and healthier individuals to leave the individual market to join AHPs. This may also entice employers with healthy employees, or who are unaware of their employees' needs for more robust coverage, to leave the small group market. In both scenarios, the ACA compliant individual and small group markets would be left with sicker and higher risk enrollees. This would result in increased premiums, particularly in the small group market, which could result in an increase in the number of uninsured individuals.

A comment submitted by the Washington State Health Benefit Exchange (WAHBE) notes: "the Proposed Rules exclude AHPs from being subject to the ACA's market rules applicable to the individual and small group insurance markets, including essential health benefits (EHB), rating, guaranteed issue, and single risk pool requirements. AHPs have a great deal to gain by avoiding the highest-cost enrollees, and these Proposed Rules allow them to form and tailor their products to do just that." I share this concern.

- **The Proposed Rule would undercut nondiscrimination rules in the provision of insurance.**

Under existing health care law, discrimination in insurance on the basis of health status-related factors is prohibited. I support the Department's application to AHPs of the ACA's prohibition of discrimination on the basis of health factors. Nevertheless, AHPs may discriminate on the basis of gender or other demographic factors, and the Final Rule must address this.

I agree with the WAHBE that "because there are no minimum required benefits that must be covered under an AHP, nondiscrimination rules with the stated intent of making it impermissible to discriminate on the basis of health status or condition are undermined under the Proposed Rule." This is deeply concerning. Although the Proposed Rule would apply HIPAA nondiscrimination standards, these protections are not sufficient to deter discriminatory treatment of employers and employees with greater medical needs. Because AHPs would be exempt from the ACA's essential health benefit, rating, guaranteed issue, single risk pool, and nondiscrimination rules, these plans would be able to structure plan offerings that result in *de facto* discrimination based on health status factors. AHPs could be offered in geographic areas that have a history of a low incidence of cancer, or may not be open to employers in specific industries with a history of higher medical claims. An AHP could offer coverage without

maternity coverage, mental health benefits, or coverage of certain prescriptions. Women could be charged rates higher than men, older individuals higher rates without limit, or individuals in certain industries higher rates than others. This scenario is unacceptable and contrary to the intent and letter of the ACA.

- **The Proposed Rule conflicts with the ACA and would undermine consumer protections provided by the ACA.**

Under the ACA, individual and small group plans are required to guarantee coverage of ten essential health benefits, including maternity coverage, emergency services, and mental health and substance use disorder services. Under the Proposed Rule, AHPs are not required to provide the same coverage.

I concur with the concerns raised in the state Attorneys General comments that the Proposed Rule is in conflict with the structure and purpose of the ACA. To reduce the number of uninsured individuals and ensure that all individuals are able to obtain the care and procedures they need, the ACA required that individual and small group plans cover essential health benefits, and established requirements of large employers so that these benefits were covered. The ACA also established other market rules applicable to the individual and small group insurance markets, including rating, guaranteed issue, and single risk pool requirements. None of these requirements apply to AHPs. The ACA, not ERISA, is the most recent and most developed federal legislation that sets forth fundamental principles of insurance coverage that applies to the broadest segments of the national population. In Washington State, the ACA has been successful in lowering uninsured rates and covering 200,000 people in the individual marketplace. AHPs contradict the intent and the letter of the ACA by offering less comprehensive coverage and will lead to greater market segmentation.

Thank you for the opportunity to provide comments on this important issue. I urge the Department to ensure that the important consumer protections established by the Affordable Care Act are maintained. Because the Proposed Rule is beyond the scope of the Department's power under ERISA and conflicts with the APA, the Department should withdraw it. If it elects to proceed, I request that the Department hold a public hearing on the Proposed Rule.

Sincerely,

BOB FERGUSON
Washington State Attorney General

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