



601 E Street, NW | Washington, DC 20049  
202-434-2277 | 1-888-OUR-AARP | 1-888-687-2277 | TTY: 1-877-434-7598  
www.aarp.org | twitter: @aarp | facebook.com/aarp | youtube.com/aarp

March 6, 2018

Secretary R. Alexander Acosta  
United States Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20120

Re: RIN 1210-AB85

Submitted electronically via regulations.gov

Dear Secretary Acosta:

AARP, with its nearly 38 million members in all 50 States and the District of Columbia, and US Territories, is a nonpartisan, nonprofit, nationwide organization that helps people turn their goals and dreams into real possibilities, strengthens communities and fights for the issues that matter most to families such as healthcare, employment and income security, retirement planning, affordable utilities and protection from financial abuse.

We appreciate the opportunity to comment on the Department of Labor's (Department) proposed rule that would expand the availability of association health plans (AHPs) by expanding the definition of "employer" under section 3(5) of ERISA. We write to express our concerns that the proposed rule's expansion of AHPs could put consumers at risk of fraud and abuse, preempt state consumer protections and oversight of these insurance products, and greatly increase the likelihood that working Americans, especially those age 50-64, would face higher insurance premiums and loss of access to critical health insurance coverage.

AARP has long raised concerns with the lack of protections and benefits for consumers under AHPs, specifically since AHPs increase the fragmentation of risk pools, which drive up the costs for older Americans<sup>1</sup>. With the passage of the Affordable Care Act (ACA), consumers in both the individual and small group markets were guaranteed a basic set of benefits and protections, including the prohibition on discrimination in coverage based on preexisting conditions and limitations on pricing based on age, as well as access to essential health benefits (EHBs). We have serious concerns that the

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<sup>1</sup> AARP letter to Sen. Enzi on S.1955, March 7, 2006

Department's proposed rule is a step backwards and will once again subject consumers to unaffordable costs and to inadequate health insurance coverage.

Our biggest concerns are that, as a result of this proposal, older Americans in the existing small group market will see much higher costs. Specifically, the proposed rule would not apply the ACA's 3:1 age rating to AHPs. Prior to enactment, health insurers were allowed to discriminate against older workers and charge small businesses in some cases ten times higher for older workers than younger workers, effectively rendering coverage inaccessible for small businesses with older workers. The 3:1 age rating in current law is already a compromise that requires older Americans to pay three times more than younger individuals for health insurance coverage that protects older workers from being charged exorbitantly higher premiums than other people based solely on age.

Not only is AARP concerned about significantly higher insurance costs for older adults, but we are also concerned about the Department's lack of ability to police these new plans. Currently, the Department employs 400 investigators to monitor over 5 million plans<sup>2</sup>. The Department acknowledges that AHPs have had a history of fraud and abuse, and yet has no significant additional resources to assure that fraud will be minimized. For those employees who find out that their hard earned money is not there when they need health insurance coverage, this can only add to the stress when they are dealing with an illness.

Moreover, the Department's proposal lacks empirical analysis on the impact of AHPs in the current small group market. We are very concerned that the proposed rule's own impact analysis concedes a great amount of uncertainty in the impact of this rule on consumers, stating that while "the impacts of this proposed rule, and of AHPs themselves, are intended to be positive on net, the incidence, nature and magnitude of both positive and negative effects are uncertain."

Alternatively, we are supportive of the 2011 AHP guidance from the Centers for Medicare & Medicaid Services (CMS) that holds "in most situations involving employment-based association coverage, the group health plan exists at the individual employer level and not at the association-of-employers level. In these situations, the size of each individual employer participating in the association determines whether that employer's coverage is subject to the small group market or the large group market rules." This ensures that employees in the small group market are afforded protections in the ACA that prevent discrimination based on age and preexisting conditions. We encourage the Administration to maintain the view that employment based coverage be based on size alone. This would ensure that the ACA's consumer protections - most importantly the 3:1 age band and protections against preexisting condition discrimination - remain intact for small group coverage.

Consumer protections in health insurance markets are critical to ensuring that consumers can rely on the coverage they purchase and that it is there when they need

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<sup>2</sup> Fact Sheet, *EBSA Restores \$1.1 Billion to Employee Benefit Plans*, [goo.gl/rQm7U6](http://goo.gl/rQm7U6)

it. The proposed rule itself provides examples (§2510.3 (d)(5)) that demonstrate the complexity of the proposal and the ability – despite the application of ERISA and HIPPA nondiscrimination standards- for discrimination based on a pre-existing condition in AHPs. The nondiscrimination standards that DOL relies upon are inadequate to providing meaningful consumer protection for older adults and people with pre-existing conditions. While an older worker may not be denied coverage outright based on their age or pre-existing condition, the proposed rule would allow AHPs to be formed and designed in such a way that would once again allow discrimination based on a pre-existing condition and higher costs for small employers that employ older workers. Accordingly, AHPs would attract and meet the needs only for a healthier pool making this coverage option unaffordable for employers with an older workforce and/or workers that have pre-existing conditions.

In addition, the Department requested comments on the types of consumer protections and disclosures that would be needed as part of any final AHP regulation. AARP strongly believes that DOL should clearly affirm that both the employer and AHP are fiduciaries with all of the attendant obligations that ERISA fiduciary duties include. The rule should make clear that employers must prudently select and monitor AHPs. The rule also must make clear that the AHP is required to serve as a named fiduciary. Given that AHP members are likely to be small employers, the AHP should be required to provide advance disclosure to employers of all fees and services, insurance contracts, and employer legal obligations under the contract. DOL also should make clear whether employers or the AHP will provide all required notices to participants and beneficiaries and DOL. Participants and beneficiaries should be provided understandable disclosure of the role of the AHP, all plan benefits and charges, and any penalties that may occur for employer, participant or beneficiary non-payment of premiums. If the AHP files the Form 5500, then the names and addresses of all participating employers must be included and searchable by employer name on the DOL website.

While the proposed rule asserts that AHPs may provide a useful service by helping small employers find insurers or pool administrative services and some risks, this proposal fundamentally undermines the quality, affordability, and availability of health insurance. Permitting an employer to contract for limited benefits will place a massive burden on older workers and their families every time a beneficiary develops a major illness such as cancer and finds out it is not covered. Current law requires employers to provide coverage that includes the EHBs. We cannot afford to take a step backwards and expose more Americans to unaffordable costs and inadequate health insurance coverage.

Once again, we thank you for the opportunity to comment on this proposed rule. If you have any questions, please do not hesitate to contact Brendan Rose on our Government Affairs staff at 202-434-3770 or [brose@aarpp.org](mailto:brose@aarpp.org).

Sincerely,

A handwritten signature in black ink, appearing to read "David Certner", with a long horizontal flourish extending to the right.

David Certner  
Legislative Counsel and Legislative Policy Director