March 6, 2018

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Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210
Attention: Definition of Employer – Small Business Health Plans RIN 1210-AB85

Re: Proposed Rule on Association Health Plans

Dear Sir or Madam:

I write on behalf of the American Benefits Council ("Council") to provide comment in connection with the proposed rule published in the Federal Register on January 5, 2018, by the Department of Labor ("Department") entitled "Definition of 'Employer' under Section 3(5) of ERISA – Association Health Plans" ("Proposed Rule").

The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly or provide services to health and retirement plans that cover more than 100 million Americans.

The Council appreciates the opportunity to provide comment with respect to the Proposed Rule.

The Department notes in the preamble to the Proposed Rule that "many consumers have continued to face rising costs of coverage," as well as "a lack of quality and affordable health care options." 83 Fed. Reg. 614, 620 (January 5, 2018). One area where

Americans have generally been able to access comprehensive, high-quality and affordable coverage options is through the employer-based system whereby employers sponsor group health coverage for use by their employees as well as their employees' spouses and dependents.

The success of the employer-based model is due, in part, because employers take very seriously their role in sponsoring health care coverage and seek to provide comprehensive coverage that meets the needs of their employees and their employees' families. Additionally, a great many of our members, as well as employers generally, provide material premium assistance to employees to bring down their employees' cost of coverage and help ensure access as needed to coverage.

The Council is generally supportive of the Proposed Rule's goal to expand access to affordable health coverage by facilitating the establishment and maintenance of association health plans or "AHPs". Under the existing "employer" definition of ERISA section 3(5) – and specifically the Department's existing "commonality of interest" standard as set forth in administrative guidance – companies (both large and small) have found, or otherwise may find it, challenging to come together to facilitate multiple employer welfare arrangements ("MEWAs") that can qualify as a single large group health plan.

We note that the Proposed Rule, if made final, would not only help small employers (including qualifying sole proprietors) access large group plan coverage, but it could also be helpful for employers more generally in certain common scenarios.

For example, the Proposed Rule would allow employers that share certain organizational or corporate goals – such as franchises in a franchisor-franchisee arrangement – to come together through the establishment of an association and qualifying AHP to secure coverage for the employees of the various franchises. Effectively, the Proposed Rule would allow these employers to pool their resources and purchase insurance as a large group under ERISA, which, in turn, could result in lower cost, higher-quality coverage for the employees of the participating franchises.

Additionally, the Proposed Rule could make it easier for employees of a joint venture to access affordable group coverage via the use of an AHP. In the Council's experience, it is not uncommon for two or more employers to come together to establish certain joint venture arrangements whereby no single entity (including affiliates) owns 80% or more of the venture. As a result, if one of the owner entities allowed the employees of the joint venture to participate in its corporate-level plans for its own employees, its plans would risk becoming MEWAS, and if the plans are insured, this could raise material state law compliance issues (since many states prohibit or strictly regulate the offering of self-funded MEWAs). The Proposed Rule, by facilitating the establishment of AHPs, could open up new, more cost-effective coverage options for these sorts of joint ventures.

Lastly, we note that the Proposed Rule, if made final, could be helpful for state and federal government contractors. While outside of the scope of this comment, some state laws, as well as federal law, require that prime contractors provide certain minimum benefits to employees working on a specific contract. *See e.g.*, Davis Bacon Act and Service Contract Act. Relatedly, contracting rules may also require or otherwise encourage a prime contractor's use of certain smaller or local subcontractors in connection with performance of the contract – however, it is not uncommon for certain of these subcontractors to lack the extent and/or quality of benefits that may be offered by the prime or other of the subcontractors. The Proposed Rule could be helpful in the contracting setting by allowing the prime contractor to establish a contract- (or contracts) specific AHP that would facilitate coverage for the employees across the participating prime and/or subcontractors.

ANY FINAL RULE SHOULD PERMIT EMPLOYERS OF ALL SIZES TO PARTICIPATE IN AHPS

The Council appreciates the Department's recognition that both small and large employers could benefit from expanded access to AHPs:

> One of the primary aims of this proposal is to give small employers (as well as sole proprietors and other working-owners) the opportunity to join together to provide more affordable healthcare to their employees; however, the proposed regulation would not restrict the size of the employers that are able to participate in a bona fide group or association of employers. The Department expects minimal interest among large employers in establishing or joining an AHP as envisioned in this proposal because large employers already enjoy many of the large group market advantages that this proposal would afford small employers. However, the Department anticipates that there may be some large employers that may see cost savings and/or administrative efficiencies in using an AHP as the vehicle for providing health coverage to their employees.

83 Fed. Reg. at 620.

For the reasons noted by the Department itself, and those discussed above, the Council urges the Department to make clear in any final rule that employers of all sizes will be permitted to utilize AHPs.

CLARIFY "WORKING OWNER" ELIGIBILITY

The Department proposes to expand the definition of an ERISA section 3(5) "employer" to include a "working owner," the latter of which would be defined in proposed regulation section 2510.3-5(e)(2).

Sub clause (iii) of the definition of "working owner" provides that a working owner cannot be "eligible to participate in **any subsidized group health plan** maintained by any other employer of the individual or of the spouse of the individual."

The reference to "any subsidized group health plan" would appear to include not only group major medical coverage, but also ancillary or supplemental group health coverages, such as dental-only or vision-only coverage. We are concerned that this requirement, as drafted, confuses group major medical coverage with supplemental or ancillary group health coverage.

It is possible that some working owners may be performing services as a common law, i.e., "W-2", employee for another business, with this other business offering some degree of health coverage, but not group major medical coverage. To help ensure that individuals are not inadvertently restricted from accessing AHP coverage by reason of having access to only ancillary group health coverage, we recommend that sub clause (iii) of the definition of "working owner" be revised to reference "group health plan coverage that is minimum essential coverage (as defined in Internal Revenue Code section 5000A)."

FINAL REGULATIONS SHOULD PROVIDE SUFFICIENT SAFEGUARDS TO PROTECT THE STABILITY OF THE INDIVIDUAL HEALTH INSURANCE MARKET

In the preamble to the Proposed Rule, the Department recognizes the potential adverse effect to the individual and small group insurance markets as a result of the proposed expansion of a section 3(5) "employer." Specifically, the Department states:

> The Department considered the potential susceptibilities of individual and small group markets to adverse selection under this proposal. All else equal, individual markets may be more susceptible to risk selection than small group markets, as individuals' costs generally vary more widely than small groups'. The Department believes that under this proposal AHPs' adherence to applicable nondiscrimination rules and potential for administrative savings would mitigate any risk of adverse selection against individual and small group markets.

83 Fed. Reg. at 620.

The Council supports policies intended to result in a robust and healthy insurance marketplace. This is, in part, because the individual market is relied upon by millions of American workers, including those who may not be eligible for employer-sponsored coverage, such as contingent and part-time workers, as well as those participating in what is often referred to as the "gig economy."

Individual insurance is also a meaningful alternative to employer-sponsored

continuation coverage (i.e., COBRA coverage) for use by an employee when he or she terminates employment or leaves the workforce. For many employees who terminate employment or otherwise leave the workforce, individual insurance coverage may be the more affordable option due to the potential eligibility for federal subsidies (especially in the absence of any premium assistance from the employer as may have been provided during active employment).

Individual insurance is also a very important source of health coverage for pre-65 retirees who are not eligible for Medicare. Access to comprehensive, affordable coverage is particularly valued by these individuals as they may experience chronic health issues generally associated with advancing age.

Finally, a robust and stable individual market that reduces the number of uninsured will decrease instances of uncompensated care. Uncompensated care for providers results in cost-shifting by providers to other payers, including large plan sponsors and participants in the health benefits plans they sponsor.

For these reasons and the overall importance of the individual insurance markets to Americans as a whole, the Council urges the Department to take steps to ensure that any final rule with respect to AHPs not result in further adverse risk selection or segmentation to the individual insurance market. This will ensure that the individual insurance market remains a viable coverage option for the tens of millions of Americans that rely on it for health insurance coverage.

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Thank you for considering these comments submitted in response to the Proposed Rule. If you have any questions or would like to discuss these comments further, please contact us at (202) 289-6700.

Sincerely,

Kathryn Wilber
Senior Counsel, Health Policy