March 6, 2018

Jeanne Klinefelter Wilson
Deputy Assistant Secretary
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.

Dear Ms. Wilson,

The American Optometric Association (AOA) appreciates the opportunity to provide comment on the Employee Benefits Security Administration proposed changes to the "Definition of 'Employer' Under Section 3(5) of ERISA—Association Health Plans." The AOA represents more than 33,000 doctors of optometry, optometry students, and paraoptometric staff. Doctors of optometry serve patients in nearly 6,500 communities across the country, and in 3,500 of those communities are the only eye doctors.

A principal objective of the proposed rule is to expand employer and employee access to more affordable, high-quality coverage. As various federal agencies look for new ways to increase options for patients and promote consumer choice, we believe agencies should work to preserve, promote, and defend the pro-patient, pro-competitive provisions of Public Health Service Act Section 2706 (the Nondiscrimination in Health Care provision). Section 2706 is an important patient-centered health insurance reform and is aimed at safeguarding a patient's right to choose the provider of their choice. Overall, Section 2706 aims to end certain health plan practices which have made it policy to summarily deny participation to a range of licensed and certified health care providers merely because those providers took a different educational path to clinical expertise, quality, and licensure. Similar in many respects to the provider nondiscrimination laws that are effective in many states, Section 2706 prevents private health care plans from banning doctors of optometry from the companies' medical eye care provider panels. Importantly, that includes employer-based health insurance programs regulated under the federal Employee Retirement Income Security Act (ERISA). In the past, offending health plans have denied or severely limited patient access to specific types of providers, even though those providers would be acting within the bounds of their training and scope of practice as statutorily defined by state law. These plans utilized tactics such as plan coverage and design, services covered, benefit limits, enrollee cost-sharing, and other schemes. These patient protections have already proven to be beneficial. In 2015, Ford Motor Company adjusted their policies to ensure that active salary and hourly United Automobile Workers along with their dependents had access to doctors of optometry for medical eye care opening up greater choice and options for Ford's employees. Section 2706 ensures important patient protections regardless of the arrangement of the patient's health plan. As the Department of Labor finalizes the rule, it's paramount to retain these protections.

We understand that the administration is working to increase innovation in the health care marketplace. We also know that the administration wants to support state-based innovation and to allow the local

leaders who best understand the needs of their residents to help make health care insurance decisions. To that end, we believe that the administration must be careful to recognize precedent that has been set on the state level with regard to multiple employer welfare arrangements (MEWAs). Specifically, in 1996, a trustee of an Employee Retirement Income Security Act of 1974 (ERISA) plan that offered benefits through a MEWA claimed that because his plan was within the protection of ERISA law, it may not be regulated as an insurance entity by the state of Colorado. The MEWA trustee argued that ERISA preemption allows a MEWA to avoid state regulation that would apply to insurance companies and employers offering the same benefits. The U.S. Court of Appeals for the 10th Circuit confirmed that state insurance laws should be applied to MEWA's that are not fully insured.[1] The Department of Labor (DOL) should affirm the Court's decision and require MEWAs that are not fully insured to comply with state insurance laws, regardless of whether changes are made to the definition of an employer. To do otherwise would be a tremendous overstep. This is an issue that is very much in need of additional guidance from the Department of Labor.

While the Department delineates some concerns with the parameters set up for Association Health Plans in the Affordable Care Act, there are certain provisions that we believe remain useful. Since 2003, ERISA required MEWAs to submit paperwork and basic information about themselves to the Department of Labor (see Section 101(g), 104(a), 505 and 734 of ERISA, as amended, and 29 CFR 2520.101-2 and 103-1). We believe that this process must continue. To best ensure that new association health plans that are developed comply with any changes that the Department of Labor finalizes, we also believe that it is important to retain the state reporting requirements for MEWAs as outlined in the ACA.

Thank you for the opportunity to provide these comments. Please contact Kara Webb, Director of Coding and Regulatory Policy at kcwebb@aoa.org for more information.

Sincerely,

Christopher Quinn, OD
President, American Optometric Association

[1] https://openjurist.org/86/f3d/1016/fuller-v-norton