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The Honorable Lisa Gomez
Assistant Secretary of Labor
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Submitted via the Federal Rulemaking Web Portal: <http://www.regulations.gov>

RE: Definition of ‘Employer’ – Association Health Plans (RIN 1210-AC16)

Dear Assistant Secretary Gomez,

The Blue Cross Blue Shield Association (BCBSA) appreciates the opportunity to provide comments on the Proposed Rule: “Definition of ‘Employer’ – Association Health Plans,” as published in the Federal Register on December 20, 2023 (88 FR 87968).

BCBSA is a national federation of independent, community-based and locally operated BCBS companies (Plans) that collectively cover, serve and support 1 in 3 Americans in every ZIP code across all 50 states and Puerto Rico. BCBS Plans contract with 96% of hospitals and 95% of doctors across the country and serve those who are covered through Medicare, Medicaid, an employer, or purchase coverage on their own.

BCBSA believes that everyone should have access to high-quality health care. We share the DOL’s commitment to ensuring the stability of the individual and small group markets by protecting against adverse selection and increased market segmentation. BCBS Plans remain committed to the Affordable Care Act markets and the exchanges. We also recognize the long-standing role that bona fide associations have played, under pre-2018 guidance, in making health coverage more affordable for certain employers and their workers. Our key recommendations regarding the proposed rule are as follows:

- **Rescind the 2018 AHP Final Rule**: BCBSA supports the DOL’s proposal to rescind the 2018 rule in full. In our comments to the 2018 proposed rule, BCBSA shared significant concerns that the rule could increase the likelihood that illegitimate associations would enter the market, disrupting coverage provided for small businesses and their employees through bona fide associations and the small employer health insurance market. Rescinding this rule in full will help to ensure access to affordable coverage for individuals and small employers.

- **Do Not Proceed with Additional Rulemaking or Guidance:** As the Department of Labor (DOL) outlines in the preamble to the proposed rule, history illustrates the need for a strong regulatory framework for coverage sold to small employers. After the enactment of ERISA, scam operators proliferated in the association market claiming to be exempt from state regulation under ERISA. Recognizing this problem, Congress amended ERISA in 1983 to allow states to protect small employers¹. Over the past several decades, the DOL and state regulators have created a strong regulatory framework that supports legitimate associations that meet the requirements of current federal guidance as additional options for small employers. There is widespread reliance on the DOL's longstanding interpretations and policies. Opening the existing regulatory framework that has been working effectively for decades to new rulemaking or guidance may have unintended consequences that could threaten access to coverage for small employers and their employees.
- **Do Not Make Changes to Existing AHP Criteria:** Bona fide associations are an important source of health insurance coverage for small employers across the country today. There is no evidence that bona fide associations have impacted the stability of the individual or small group markets, which have successfully operated alongside these legitimate associations for several decades. There is no need to modify existing AHP criteria to support individual or small group market stability.

We appreciate your consideration of our comments. If you have any questions or want additional information, please contact Robert Metz at Robert.Metz@bcbsa.com.

Sincerely,



Kris Haltmeyer
Vice President, Policy Analysis
Policy & Advocacy

¹ ERISA § 514(b)(6) (29 U.S.C. § 1144(b)(6)).

BCBSA Detailed Comments and Recommendations on the Proposed Rule: “Definition of ‘Employer’ – Association Health Plans”

Issue #1:

The DOL proposes to rescind in full the DOL’s 2018 Final Rule entitled “Definition of Employer—Association Health Plans” (2018 AHP Rule) by removing and reserving 29 CFR 2510.3-5.

Recommendation:

BCBSA supports the DOL’s proposal to rescind in full the 2018 AHP Rule.

Rationale:

In 2018, BCBSA wrote to the DOL sharing our concerns with the Proposed Rule. Specifically, BCBSA stated “we are concerned that key provisions in the Proposed Rule – namely the relaxation of sponsorship requirements and commonality of interest standards for association health plans (AHPs), coupled with the inclusion of employers with no common-law employees (“working owners”) – will harm the existing options available to small businesses in both the small group and association markets.” While the DOL made changes in the Final Rule to address some of BCBSA’s concerns, such as by permitting state regulation of AHPs, BCBSA remained concerned that provisions of the Final Rule would open the door to illegitimate associations and threaten the stability of the Affordable Care Act markets. Rescinding the 2018 AHP Rule in full will help to ensure access to care for employees who obtain their coverage through small employers and existing or future bona fide AHPs, as well as provide the regulatory stability and clarity that had been missing during the ongoing litigation.

Issue #2:

The DOL requests comment on whether the DOL should propose a rule to codify existing guidance or issue additional guidance clarifying the application of existing guidance.

Recommendation:

BCBSA strongly recommends that the DOL not propose a rule to codify existing guidance or issue additional guidance related to bona fide AHPs.

Rationale:

The existing regulatory framework for bona fide AHPs includes not only DOL advisory opinions, but also rules from the U.S. Department of Health and Human Services, state law, and judicial precedent. This framework has been effectively refined over several decades to strike an appropriate balance of protecting against adverse selection in the individual and small group markets, while enabling access to coverage through legitimate associations. There is widespread reliance on the DOL’s longstanding interpretations and policies by bona fide associations, their employer members, and health insurers. Issuing new rulemaking or guidance may result in litigation or state laws with unintended consequences that could threaten this balance and disrupt coverage for small employers. Moreover, codifying into regulation the existing collection of DOL advisory opinions that were issued over more than three decades is

unlikely to be a straightforward exercise, and would likely create ambiguities and confusion for small employers. Maintaining the existing regulatory framework is the best path to ensuring continued access to coverage.

Issue #3:

The DOL requests comment on whether the DOL should revise existing criteria for bona fide AHPs.

Recommendation:

BCBSA strongly recommends that the DOL not revise existing criteria for bona fide AHPs.

Rationale:

In the preamble to the Proposed Rule, the DOL discusses the potential for adverse selection against the individual and small group markets as a reason to rescind the 2018 AHP Rule, as well as the potential for financial mismanagement or abuse. BCBSA shares these concerns related to the 2018 AHP Rule, but does not believe they extend to existing bona fide AHPs. Legitimate associations have a vested interest in ensuring the financial health of the businesses they represent, including their members' health benefits costs. These bona fide associations have offered health insurance coverage along with a host of other benefits such as education and training, conferences, discounts, other insurance programs, and advocacy for their members' business interests. Existing DOL guidance has been effectively protecting against these risks by requiring that the employer members have common interests and a business purpose unrelated to the provision of benefits, the association acts in the interest of its employer members, and employer members exercise control over the benefit arrangement. Moreover, all large employer plans, including AHPs, are required to offer the following consumer protections:

- Prohibition of discrimination based on health factor (45 C.F.R. 147.110)
- Guaranteed availability (45 C.F.R. 147.104)
- Guaranteed renewability (45 C.F.R. 147.106)
- Prohibition on retroactive rescission of coverage (45 C.F.R. 147.128)
- Maximum waiting period limit (45 C.F.R. 147.116)
- Dependent coverage to age 26 (45 C.F.R. 147.120)
- Prohibition on pre-existing condition exclusions (45 C.F.R. 147.108)
- Prohibition on lifetime and annual limits for any covered essential health benefits (45 C.F.R. 147.126)
- Internal appeals process (45 C.F.R. 147.136)
- Annual limitation on cost-sharing protections (42 U.S. Code § 300gg-6)

There is also an extensive state regulatory infrastructure to support bona fide AHPs. State regulation and oversight authority have been essential to protecting consumers against serious financial harm resulting from fraud and insolvency of illegitimate associations². State insurance

² For a discussion on state and federal regulation of self-insured MEWAs see, Kofman, Mila; Libster, Jennifer, "Turbulent Past, Uncertain Future: Is It Time to Re-evaluate Regulation of Self-Insured Multiple Employer Arrangements?" *Journal of Insurance Regulation*, Spring 2005, Volume 23, No 3, pp 17-33. And Kofman, Mila; Lucia, Kevin; Eliza, Bengit; Pollitz, Karen, "Association Health Insurance: Is It Time to Regulate this Product?" *Journal of Insurance Regulation*, Fall 2005, Volume 24, Issue 1, pp 31-45

departments exercise broad authority over AHPs, including registration requirements, solvency standards, mandated benefits, marketing standards, required contributions to guaranty funds, and other insurance market rules and oversight authorities. States are best equipped to manage the health and solvency of their markets and they have proven to be best situated to regulate traditional insurance products and association health plans within their jurisdiction.

Additionally, existing bona fide associations have not impacted the stability of the individual and small group markets. Plan selections on the individual marketplaces increased from 11.4 million to 16.4 million between 2019 and 2023. Average individual monthly premiums on the marketplaces after Advance Premium Tax Credits decreased from \$164 in 2021 to \$129 in 2023³. Individual market premiums nationally have remained roughly flat in recent years, only rising 0.2% annually between 2018-2022. While small group market enrollment has decreased modestly in recent years, premiums only rose by 3.2% annually between 2018-2022 nationally⁴. The recent decrease in insured small group market enrollment does not appear to be related to bona fide associations, which have operated successfully alongside the small group market for several decades. Modifying AHP criteria is not necessary and could instead undermine access for those who currently receive their coverage through existing bona fide associations.

³ <https://www.cms.gov/files/document/health-insurance-exchanges-2023-open-enrollment-report-final.pdf>

⁴ NAIC Supplemental Healthcare Exhibit YE 2018- YE 2022, CA excluded