UPMC LIFE CHANGING MEDICINE

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Feburary 20, 2024

Lisa M. Gomez
Assistant Secretary
Employee Benefits Security Administration
Office of Regulations and Interpretations
Room N–5655, U.S. Department of Labor
200 Constitution Ave. NW
Washington, DC 20210
Attention: Proposed Rescission of AHP Final Rule RIN 1210–AC16

Submitted electronically via http://www.regulations.gov

Re: Proposed Rescission of 2018 rule entitled "Definition of Employer—Association Health Plans" (RIN 1210–AC16)

Dear Assistant Secretary Gomez:

UPMC Health Plan and the integrated companies of the UPMC Insurance Services Division (collectively, "UPMC") are pleased to submit the following comments in response to the Employee Benefits Security Administration ("EBSA" or the "Agency") proposed rule entitled Definition of "Employer"-Association Health Plans (the "Proposed Rule").

UPMC offers a full range of health coverage products including commercial individual, student, and employer group plans, Medicaid, CHIP, Medicare Advantage (MA), Medicare Special Needs Plans (SNPs), behavioral health, dental, vision, employee assistance, workers' compensation coverage, and third-party administrator (TPA) services. Since beginning operations in 1996, UPMC has repeatedly been recognized for its dedication to quality and outstanding customer service across its product lines. UPMC currently provides commercial coverage to approximately 100,000 individual Marketplace enrollees as well as over 450,000 enrollees in our small and large group plans. Our Medicaid managed care organizations (MCOs), UPMC *for You*, UPMC Community HealthChoices, and Community Care Behavioral Health Organization, provide coverage of physical health, long term services and supports, and mental health and substance abuse services for over 2.1 million Medicaid enrollees in

Pennsylvania. Our CHIP MCO, UPMC *for Kids*, serves over 35,000 children in Pennsylvania. In addition, our UPMC *for Life* MA Plans serve more than 200,000 members combined through the MA Part C/D and D-SNP programs. Collectively, our commercial, benefits management, and government programs membership exceeds 4.2 million.

We thank the Agency for affording issuers and other stakeholders an opportunity to comment on its proposal to rescind the 2018 Association Health Plan Rule (the "2018 AHP Rule"). UPMC fully supports the Agency's proposal and respectfully offers the following comments on the Proposed Rule.

Rescission of the 2018 Rule

In the Proposed Rule, EBSA discusses how the 2018 AHP Rule broke with historical interpretations of the definition of "employer" in the section of ERISA related to employee benefit plans. In determining whether a group or association of employers is capable of sponsoring an ERISA plan on behalf of its employer members, the pre-rule (i.e., prior to 2018) guidance consistently focused on employment-based arrangements. As we expressed in our public comments on the 2018 proposed rule, and as we reiterate below, UPMC agrees with the district court's assessment in 2019 that the expanded interpretations of the definition of employer in the 2018 rule were inconsistent with the Agency's historical interpretations as well as ERISA's plain statutory language. UPMC also supports codification of the Agency's pre-rule guidance in regulation and would welcome the opportunity to provide comments on such a proposal. In addition, we would support further clarification of states' oversight authority over AHPs, as described in the following section.

State Oversight and Market Integrity

As EBSA explains in the Proposed Rule, AHPs generally qualify as Multiple Employer Welfare Arrangements (MEWAs), and ERISA preemption does not apply to MEWAs with regards to plan and non-plan regulation by state insurance departments. This treatment of MEWAs as subject to state insurance laws is essential for protecting individuals from financial risk and lack of coverage due to MEWA mismanagement. Moreover, as we asserted in our comments on the 2018 AHP Rule, uniform coverage standards and effective regulatory oversight are

fundamental to the long-term stability of any insurance market. While the nature of coverage standards and the level of regulation may be appropriate matters of discussion and flexibility, uniformity and efficacy of oversight authority are not.

State regulators have long been the arbiters of their insurance markets and many, including Pennsylvania, have a well-established history of ensuring the existence of functional insurance markets while also representing and protecting insurance consumers from harm; these functions become much more difficult in the face of unregulated insurance products that further fragment existing risk pools. In order to avoid inadvertently and unsustainably increasing costs for the individual and small group markets at large, we think it critical that AHPs be positioned to operate on a level playing field with other forms of group coverage. This should include being subject to State regulation, oversight, and filing requirements, and should also include prohibitions against varying rates based on age, geography, or gender in a manner that increases costs or threatens market stability. We respectfully urge the Department to adopt such standards, and any other standards implied by a "level playing field" approach to the group market, in future rulemaking.

"Working Owners" as "Employers"

UPMC supports EBSA's assessment that, in allowing sole proprietors to participate in AHPs as "working owners" for purposes of participating in and being covered by an AHP, the 2018 AHP Rule failed to appropriately account for the consequences of this decision. Under pre-rule guidance, a legal entity, including one established by a sole proprietor or a working owner, is included in the relevant ERISA definition of "employer" only when the subject business has employees other than the owner(s) and their spouse(s). The 2018 AHP Rule attempted to modify this historical limitation by allowing sole proprietors and working owners to be treated as both employers and employees for purposes of participating in, and being covered by, a group health plan (whether via an association or otherwise). However, the definition of "employer" in the 2018 AHP Rule was fundamentally inconsistent with ERISA's statutory language and would have created additional inconsistencies with group health plan (GHP) rules under the Public Health Service Act (PHSA). Under the 2018 AHP Rule, owners without employees (and issuers providing their coverage) would have been subject to individual market rules under the PHSA but group market rules

under ERISA. In addition, other such inconsistencies would have been likely to arise under current State law or regulation with respect to both group health coverage and associations, resulting in a confounding patchwork of market rules and authorities as well as untenable regulatory and compliance conflicts with no clear resolution.

We further agree with EBSA's conclusion that it is necessary to retain the requirement of a genuine employer-employee relationship in order for a group of employers to meet the standard of being a *bona fide* group or association of employers for the purpose of participating in an AHP. As the Agency aptly states in the Proposed Rule, "treating people as 'employers' when they have no employees risks converting ERISA from an employment-based statute… to one that regulates the sale of insurance to individuals, without regard to an employment relationship." We agree.

The "Commonality of Interest" Test

Under pre-rule guidance, the test of whether an AHP is established by a *bona fide* association of employers uses a somewhat flexible "facts and circumstances" analysis that includes, among other factors, requirements for a "commonality of interest," sometimes also referred to as an "organizational nexus," intended to evaluate the legitimate business and organizational purposes, other than pooling insurance risk, of asserting an association relationship. The 2018 AHP Rule attempted to dramatically reduce the level of underlying shared interest or inter-member relationship required to assert association status, and would have allowed a diversity of employers to claim such status based merely on their participation in the "same trade, industry, line of business, or profession." Furthermore, the 2018 AHP Rule offered an alternative approach of establishing "geographic commonality" that would have allowed employer associations to meet the commonality standard based on common geographic location alone – even absent other factors such as shared industry, trade, line of business, or profession.

In our comments on the 2018 proposed rule, UPMC argued that the wholesale elimination of historical criteria in this regard risked inadvertently creating a marketplace ripe for the establishment of specious or fraudulent associations that, under limited state oversight, could lead to deleterious financial

consequences for participating small businesses. We cautioned then, and the Agency now acknowledges in the Proposed Rule, that minimally regulated AHPs and MEWAs have a well-established history of fraud and insolvency. We concur with the Agency's decision to rescind this overly permissive revision to the commonality test and support the reinstatement of the commonality of interest test as set forth in the pre-rule guidance.

In conclusion, we thank EBSA for affording plans and other stakeholders the opportunity to comment on the Proposed Rule. UPMC is supportive of the Agency's proposed rescission of the 2018 AHP Rule and agrees that this action will provide valuable reassurance and support for ERISA's statutory purposes and related policy goals. We appreciate the Agencies' consideration of these comments and look forward to continued dialogue and collaboration in the future.

Respectfully Submitted,

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VP Health Policy & Commercial Products
UPMC Health Plan | UPMC Insurance Services Division