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February 20, 2024

U.S. Department of Labor  
Office of Regulations and Interpretations  
Employee Benefits Security Administration  
ATTN: Proposed Rescission of AHP Final Rule RIN 1210-AC16  
Room N-5655  
200 Constitution Ave. NW  
Washington, DC 20210

**Re: Notice of Proposed Rulemaking, “Definition of ‘Employer’ – Association Health Plans” (Published in Federal Register Volume 88, Number 243, page 87968 on December 20, 2023)**

Dear Acting Secretary Su:

The Massachusetts Health Connector (“Health Connector”), a state-based Marketplace (SBM) authorized under the Patient Protection and Affordable Care Act of 2010 (“ACA”), the Massachusetts Division of Insurance (“DOI”), and the Massachusetts Attorney General’s Office (“AGO”) appreciate the opportunity provided by the Department of Labor (DOL) to comment on the proposed rule, **“Definition of ‘Employer’ – Association Health Plans”**.

Founded in 2006 as part of bipartisan state health reform, the Massachusetts Health Connector is the longest-running State-Based Marketplace (SBM) in the country. The Health Connector is designed to connect Massachusetts residents and small businesses with high quality, affordable health coverage and to promote universal health coverage in the Commonwealth. Today, the Health Connector serves nearly 275,000 individuals and over 13,000 small business employees from more than 2,000 businesses. The Health Connector’s efforts have contributed to the Commonwealth’s status as the healthiest state in the nation,<sup>1</sup> with a nation-leading health insurance rate over 97 percent,<sup>2</sup> and among the lowest-cost average Marketplace premiums in the country in 2024.<sup>3</sup>

<sup>1</sup> See <https://wellbeingindex.sharecare.com/wp-content/uploads/2023/09/CWBI-State-Rankings-Report20230828.pdf>

<sup>2</sup> Kaiser Family Foundation analysis of U.S. Census Bureau data, at <https://www.kff.org/other/state-indicator/health-insurance-coverage-of-the-total-population-cps/?currentTimeframe=0&sortModel=percent7Bpercent22collIdpercent22:percent22Locationpercent22,percent22sortpercent22:percent22ascpercent22percent7D>

<sup>3</sup> [Kaiser Family Foundation analysis](#) of data from Healthcare.gov, state rate review websites, and state plan finder tools. [Analysis of CMS Public Use Files](#).

The DOI regulates Massachusetts' insurance companies and enforces rules that apply to the merged individual/small group health market. The DOI monitors all coverage being marketed to individuals and small groups and oversees the health products that are offered both on and off the Health Connector.

Massachusetts has historically been one of the most vigilant states in overseeing and prosecuting AHPs that fail to comply with state insurance laws and regulations, and the AGO has been at the forefront of efforts to protect consumers from fraud and misconduct by AHPs. Massachusetts, alongside ten states and the District of Columbia, filed in federal court<sup>4</sup> under the Administrative Procedure Act, alleging that the 2018 AHP Rule's treatment of AHPs is contrary to the ACA and the Employment Retirement Income Security Act ("ERISA"). That case is currently stayed in the D.C. Circuit pending revisions to the rule by DOL.

We strongly support DOL's proposed rule to rescind the 2018 AHP rule. In addition, we encourage the DOL to codify AHP guidance into federal regulations and ensure the applicability of nondiscrimination rules to AHPs to ensure clarity. We appreciate the opportunity to comment on how the proposed rule and additional rulemaking to clarify AHP guidance will support market stability, protect consumers, and improve affordability. We respectfully offer the following comments relating to the proposed rule.

**We support DOL's proposal to rescind the 2018 AHP regulation and we strongly agree that this action would strengthen consumer protections, increase market stability, and promote affordability for individuals and small groups.** Implementation of the 2018 AHP rule would have allowed some individual and small group health insurance coverage to be treated as large group coverage and evade critical consumer protections under the ACA. For example, AHPs could be used as a pathway to avoid the ACA requirement to cover essential health benefits such as emergency services, maternity care, and newborn care. As our agencies, and many other commenters noted in response to the 2018 AHP rule, implementation of the 2018 rule would have led to adverse selection in the individual and small group markets by drawing healthier, younger people into AHPs, thus increasing premiums for those remaining in those markets. The Department even acknowledged in the 2018 AHP rule that the rule's "increased regulatory flexibility" would necessarily result in some segmentation of risk that favors AHPs over individual and small group markets and some premium increase for individuals and other small businesses remaining in the individual and small group markets.

Massachusetts state law requires that Massachusetts small groups that are part of a Multiple Employer Welfare Arrangement (MEWA) or AHP obtain coverage and establish rates pursuant to Massachusetts merged market rating and benefits rules. Therefore, implementation of the 2018 AHP rule would not have impacted the Massachusetts market in the same way as other states, due to more protective state laws. Still, we strongly believe rescinding the 2018 AHP rule is critical to protect consumers, strengthen market stability, and promote affordability for small groups nationwide. In response to the proposed 2018 rule, Massachusetts engaged an independent actuarial firm to evaluate premium impact to our merged market if AHPs not clearly subject to state regulation were to be introduced in Massachusetts. The results indicated that merged market premiums could rise by over 10% in the year after implementation alone due to over 40% of the state's lower-risk small businesses exiting the market, with additional premium increases to follow in later years. This downward spiral could be exacerbated by any number of factors, in some instances escalating to as much as a 15% increase in merged market premiums. This would in turn have impacted federal expenditures for premium tax credits as well. In addition to protecting consumers

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<sup>4</sup> See <https://litigationtracker.law.georgetown.edu/litigation/state-of-new-york-et-al-v-united-states-department-of-labor-et-al/>.

and markets across the country, rescinding the 2018 AHP rule would also protect Massachusetts consumers in cases where employers join an AHP in a state with limited regulatory oversight.

We thank the Department for giving greater attention to the negative long-term impacts on market risk and affordability that the 2018 AHP rule introduced, especially in the small group and individual markets.

**In addition to rescinding the 2018 AHP rule, we strongly support further action to resolve uncertainty regarding the existing guidance and advisories that define “employers” and the ability of a group or association to establish an ERISA plan.** As noted in the proposed rule, we are aware that the Department has also considered codifying in regulations, the pre-2018 guidance, proposing additional new guidance for clarity, or some combination of both. We agree that there are many benefits to codifying guidance especially considering that this guidance is largely in the form of advisory opinions, which do not have the same applicability as regulations, making it difficult for entities to determine if the pre-rule guidance applies to their specific circumstances. Codifying guidance would help set clear expectations about whether a group or association may sponsor an ERISA group health plan, better insulate the market from interpretation of business arrangement definitions that would harm markets and consumers, and more clearly define what is and is not an employer relationship. This clarity is particularly timely given the large number of individuals nationwide who are transitioning from Medicaid and CHIP and seeking alternative forms of affordable coverage. In addition, it is essential that codification of AHP guidance include strong nondiscrimination protections for AHPs and their members. Codification of AHP guidance would further ensure clarity around the definition of an employer, the ability to establish AHPs, and the applicability of the ACA’s consumer protections.

We thank you for consideration of our comments and look forward to working with DOL on continuing efforts to protect consumers, strengthen markets, and improve coverage affordability for small businesses.

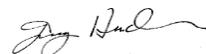
Sincerely,



Audrey Morse Gasteier  
Executive Director  
The Massachusetts Health Connector



Sandra Wolitzky  
Division Chief, Health Care Division  
Massachusetts Office of the Attorney General



Gary Anderson  
Commissioner  
Massachusetts Division of Insurance