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March 6, 2018

Jeanne Klinefelter Wilson

Deputy Assistant Secretary

Employee Benefits Security Administration

US Department of Labor

200 Constitution Avenue NW

Washington, DC 20210

RE: Definition of Employer Under Section 3(5) of ERISA-Association Health Plans (RIN 1210-AB85)

Dear Deputy Assistant Secretary Wilson:

The National Health Council (NHC) submits this comment letter to express significant concerns with the Employee Benefits Security Administration's (EBSA's) proposed rule modifying the definition of "employer" for purposes of Association Health Plan (AHP) qualification (the "Proposed Rule").¹

The NHC is the only organization that brings together all segments of the health community to provide a united voice for the more than 133 million people with chronic diseases and disabilities and their family caregivers. Made up of more than 100 national health-related organizations and businesses, its core membership includes the nation's leading patient advocacy organizations, which control its governance. Other members include professional and membership associations; nonprofit organizations with an interest in health; and representatives from the pharmaceutical, generic drug, health insurance, device, and biotechnology industries.

The NHC strongly urges the Administration to strengthen its role in ensuring that the laws intended to promote meaningful access to health care are executed and implemented to maximize progress toward the goal of delivering high-quality health care to everyone, including those with chronic conditions. To that end, we have identified three key domains and 10 specific values essential to ensuring that legislative and regulatory actions meet the needs of patients.² The three overarching domains are:

- Ensure meaningful and affordable access
- Provide coverage for pre-existing conditions
- Eliminate annual and lifetime caps

¹ <https://www.federalregister.gov/documents/2018/01/05/2017-28103/definition-of-employer-under-section-35-of-erisa-association-health-plans>

² <http://www.nationalhealthcouncil.org/sites/default/files/V%20%26%20D%20to%20Ensure%20Patient-Focused%20Health%20Care%20Reform%203.13.17.pdf>

The NHC has serious concerns that by exempting AHPs from Affordable Care Act (ACA) provisions that protect patients and ensure a stable risk pool, the Proposed Rule will disproportionately impact individuals with chronic diseases and disabilities. When combined with the recently-published companion proposal on short-term health plans, this proposal will have an even more devastating impact on these high-need patients. Our comments are offered within the Proposed Rule's context as part of a larger set of proposed policy changes that will have a cumulative destabilizing impact on the ACA marketplace. As more fully detailed in the pages that follow, the NHC believes that:

- The Proposed Rule will have a profound impact on people with chronic conditions who depend on the patient protections of the ACA;
- The Proposed Rule will inject substantial risk for ACA marketplaces and marketplace enrollees;
- Encouraging proliferation of minimally regulated AHPs could reintroduce past high levels of abusive practices within the AHP industry to the detriment of enrollees; and
- The Proposed Rule's regulatory impact analysis must consider the cumulative impact of other policy changes that destabilize the market.

The Proposed Rule will have a profound impact on people with chronic conditions who depend on the patient protections of the Affordable Care Act.

As the united voice for those with chronic diseases and disabilities, the NHC believes that when implementing any health care policy, broad patient protections makes for a better market, while improving care and access for vulnerable patient populations. AHP coverage, under the Department's longstanding interpretation of ERISA, has been subject to the ACA's protections for people with pre-existing conditions, must cover the essential health benefits package, comply with community rating rules, and comply with network adequacy requirements. The Proposed Rule sharply diverges from the Department's historic implementation of ERISA by expanding its previously narrowly construed exception under which AHPs may act as a single employer. AHPs offered by general business groups or that include individual members have never qualified for this exception.

The NHC is concerned that the AHP proposal destroys many of the patient protections that individuals with chronic diseases and disabilities rely upon.

- AHPs would not be required to cover essential health benefits such as medications and emergency services. This would also result in the return of lifetime and annual benefit limits and unlimited out-of-pocket costs, which are only essential health benefits;
- AHPs will not be subject to community rating, which prohibits insurers from charging higher premiums for those with pre-existing conditions;
- There are no network adequacy requirements that would apply to AHPs under the Proposed Rule, despite the potential for plans to sell policies in multiple states;
- The nondiscrimination protections contained in the Proposed Rule do not address benefit designs that can drive adverse selection;
- Small business owners with few employees and a predominantly healthy workforce could choose a low-premium AHP with limited benefits that would be of little practical use for an individual with complex health care needs; and

- Employers offering AHP coverage to employees otherwise qualifying for a subsidized ACA plan marketplace plan would, in effect, terminate employee eligibility for premium and cost-sharing subsidies to help them afford their coverage and care.

The Department declined to address the impact its policy would have on individuals with modest incomes who are employed in small businesses, noting simply that “AHPs will also affect tax subsidies and revenue and the Medicaid program. While the impacts of this proposed rule, and of AHPs themselves, are intended to be positive on net, the incidence, nature and magnitude of both positive and negative effects are uncertain.”

The NHC firmly believes that the net impact of the Proposed Rule is reduced availability of affordable health care for those who need it most. Individuals with chronic diseases and disabilities offered an AHP by their employer would become ineligible for premium and cost-sharing subsidies to help them afford coverage and care. This would mean that if offered an AHP by their employer, they would have to choose between paying their share of the premium for an AHP that won't meet their needs; purchasing marketplace coverage and absorbing the full premium, deductible, and cost-sharing burden; or declining to purchase coverage at all.

The Proposed Rule will inject substantial risk for the ACA marketplaces and marketplace enrollees.

The NHC believes the Department's proposed change in the definition of “employer” to accommodate the directives under the October 12, 2017 Executive Order will inject risk for ACA marketplace insurers that the ESBA has not considered, and that clearly outweigh the benefits of any policy objectives the Proposed Rule purports to advance. The Department of Labor (the Department) has consistently required a genuine organizational relationship between employers, beyond an interest to fund or provide benefits, to treat the AHP as a single employer under ERISA section 3(5).³ Similarly, a self-employed individual has never been included within the understood definitions of either an employee or an employer. The Department has relied on its longstanding interpretations as largely dictated by the ERISA statute and necessary to help ensure that AHPs are based upon true employer-employee relationships and a bona-fide employment-based association among employers within an AHP.

Under the Proposed Rule, more AHPs would be regulated as large group health plans with significant flexibility in designing benefits and setting premiums, and would be exempt from many of the ACA's patient protections, including the essential health benefits requirement, community rating, and provider network adequacy standards. The NHC has grave concerns that allowing AHPs to sell an unregulated product in parallel with plan offerings in the ACA-compliant small group and individual markets will segment the market and create an unlevel playing field.

The Proposed Rule's central premise of offering lower-cost plans with benefits more suited to a healthy enrollee's (or, more likely, an employer's) needs, not only allows but encourages adverse selection through plan design. AHP plans will be designed to attract healthier individuals and groups, with issuers in the ACA-compliant market adjusting to the increased risk by either leaving the ACA marketplace or raising premiums. In fact, the Congressional Budget Office (CBO), examined the potential benefits and risks presented by a largely-unregulated AHP

³ See, e.g., Advisory Opinion 2017-02AC. <https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/advisory-opinions/2017-02ac>

market, and expressed concerns about likely premium increases in the “traditional” small-group market long before implementation of the ACA’s further regulation of individual and small group health plans.⁴

The American Academy of Actuaries recently expressed its concerns with the expanded use of AHPs considered as part of the various “repeal and replace” initiatives, concluding that:

AHPs could result in unintended consequences such as market segmentation that could threaten non-AHP viability and make it more difficult for high-cost individuals and groups to obtain coverage, AHP insolvencies if they are not subject to clear regulatory authority and solvency requirements, and lack of consumer protections if AHPs are not subject to state-level protections.⁵

The National Association of Insurance Commissioners (the NAIC) echoed these concerns in a Consumer Alert entitled “Association Health Plans Are Bad for Consumers.”⁶ The Department similarly acknowledged the risks associated with broader AHP availability, and is likely aware of the clearly articulated objections shared by the American Academy of Actuaries, the NAIC, and America’s Health Insurance Plans (AHIP), which commissioned an analysis identifying and quantifying these risks.⁷ Despite mounting critiques and data demonstrating significant negative impacts on the small group and individual market risk pools, the Proposed Rule dismisses this risk, suggesting that it “may be small, however, relative to the benefits realized by small businesses and their employees that gain access to more affordable insurance that more closely matches their preferences.”⁸

The NHC strongly disagrees with this conclusion – the financial benefits of lower premiums for employers and healthy individuals does not diminish the likelihood, or counterbalance the magnitude of harms to individuals with chronic diseases and disabilities if comprehensive health care coverage is either unavailable or unaffordable. The current landscape is fragile, with many geographic areas limited to very few, or even one, issuer. As more issuers leave the ACA marketplace and remaining plans increase premiums to accommodate perceived increased risk, more individuals relying on marketplace coverage to enable access to health care services and medications will be unable to afford it.

Additionally, the Department failed to consider, discuss, or invite comment on the potential that AHP participants, particularly those that are self-employed could easily mitigate the risk of worsening health by acting as an “employer” to terminate AHP coverage and then use that discontinuation of employer-sponsored coverage to trigger a special enrollment period enabling purchase of a marketplace plan. In fact, it would be relatively easy to use AHP coverage until there is a need for more comprehensive coverage, then switch back if the higher-cost condition resolves. Neither AHPs, the underlying plan issuers, nor the self-employed individuals and employers potentially purchasing or offering AHP coverage would have any incentive to ensure

⁴ CBO Paper—Increasing Small-Firm Health Insurance Coverage Through Association Health Plans and HealthMarts, January 2000. <https://www.cbo.gov/publication/12066>

⁵ American Academy of Actuaries, Issue Brief: Association Health Plans, <https://www.actuary.org/content/association-health-plans-0>

⁶ http://www.naic.org/documents/consumer_alert_ahps.pdf

⁷ <https://www.ahip.org/report-how-association-health-plans-impact-enrollment-and-premiums/>

⁸ <https://www.federalregister.gov/documents/2018/01/05/2017-28103/definition-of-employer-under-section-35-of-erisa-association-health-plans>

a balanced risk pool or implement rules to counter any potential abuses of special enrollment periods under the ACA, further destabilizing the markets.

Encouraging proliferation of minimally regulated AHPs could reintroduce past high levels of abusive practices within the AHP industry to the detriment of enrollees.

The Proposed Rule acknowledged the need for federal and state regulation of multiple employer welfare arrangements, including AHPs:

Some MEWAs have provided quality health coverage to their members' employees with less administrative overhead. But others have failed to pay promised health benefits to sick and injured workers while diverting, to the pockets of fraudsters, employer and employee contributions from their intended purpose of funding benefits.⁹

The NHC echoes the concerns expressed by the Department, as well as by stakeholders including the National Association of Insurance Commissioners, the National Governors Association, the National Conference of Insurance Legislators, and more than 1,000 state government, business, labor, consumer, and provider groups in a letter addressed to the Senate as it considered health care reform legislation.¹⁰ AHPs have had a long history of abusive practices within the industry, including failure to pay for benefits, and diverting premium funds, as well as significant solvency issues that triggered Congressional action.

The Proposed Rule discusses a framework of joint oversight through which the Department and State regulators would “ensure appropriate consumer protections for employers and employees relying on an AHP for health care coverage.”^{11,12} The NHC remains concerned that the Department and the various states lack sufficient resources to provide the level of oversight required if implementation of the Proposed Rule triggers a rapid increase in the number of AHPs. The states have relied upon the ACA protections for plans issued in the small group market, and few MEWAs have fallen under the large group employer-sponsored exception to ACA regulation. The potential that these minimally-regulated AHPs would seek to issue plans in multiple states further complicates oversight functions.

The NHC is similarly concerned that the Proposed Rule overstates the authority states will have in regulating AHPs with respect to coverage requirements, ratings, and similar parameters, as AHPs likely will identify states with the greatest issuer flexibility and sell “across state lines” to avoid more stringent coverage and patient-protection requirements. We urge the Department to provide greater clarity on the joint oversight framework; identify the additional resources required at the federal level; assess the timeframe states would need to align their laws, regulations, and processes to identify and combat AHP mismanagement and abuse; and set appropriate standards for AHPs operating or issuing plans in their state.

⁹ <https://www.federalregister.gov/documents/2018/01/05/2017-28103/definition-of-employer-under-section-35-of-erisa-association-health-plans>

¹⁰ <https://www.ahip.org/ahip-letter-to-senate-finance-committee-on-tax-reform/>

¹¹ See, ERISA section 514(b)(6).

¹² <https://www.federalregister.gov/documents/2018/01/05/2017-28103/definition-of-employer-under-section-35-of-erisa-association-health-plans>

The Proposed Rule’s regulatory impact analysis must consider the cumulative impact of other policy changes that destabilize the market.

In preamble to the Proposed Rule, the ESBA cited Executive Order 13813, “Promoting Healthcare Choice and Competition Across the United States,”¹³ which prioritized three near-term policy areas for expanding non-ACA options – AHPs; short-term, limited-duration insurance; and health reimbursement arrangements (HRAs).

As the Department acknowledges, its proposed expansion of the definition of “employer” to enable and expand non-ACA-compliant insurance alternatives for small businesses and sole proprietorships will undoubtedly impact the stability of the ACA marketplace. The NHC notes that, while the Department briefly acknowledges the potential cumulative impact of the Administration’s policy priorities on the ACA marketplace, the recently-published proposed rule expanding the permissible policy period for short-term insurance plans¹⁴ omits consideration of the AHP expansion.

The NHC urges the Department to take a holistic view of the marketplace and the impact of the Administration’s entire set of initiatives. It must examine impact with a clear focus on the needs of individuals with chronic diseases and disabilities who likely will face significant health consequences. We expect that the incremental financial benefits potentially realized by self-employed individuals and small business owners would be an insufficient counterbalance to the Proposed Rule’s likely impact on risk pools generally, and the availability of meaningful, affordable coverage for those with chronic diseases and disabilities.

Conclusion

The NHC appreciates the opportunity to submit comments on the Proposed Rule. As the voice for individuals with chronic diseases and disabilities, and their family caregivers, the NHC urges the ESBA to ensure that patient access and autonomy are paramount as it considers expanding availability, and decreasing regulation, of AHP alternatives to comprehensive health care coverage.

Please do not hesitate to contact Eric Gascho, Vice President of Policy and Government Affairs, if you or your staff would like to discuss these issues in greater detail. He is reachable by phone at 202-973-0545 or via e-mail at egascho@nhcouncil.org.

Sincerely,



Marc Boutin, JD
Chief Executive Officer

¹³ <https://www.whitehouse.gov/presidential-actions/presidential-executive-order-promoting-health-care-choice-competition-across-united-states/>

¹⁴ <https://www.federalregister.gov/documents/2018/02/21/2018-03208/short-term-limited-duration-insurance>