Congress of the United States

Washington, D.C. 20515

March 6, 2018

The Honorable R. Alexander Acosta
Secretary, U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20120

Re: RIN 1210-AB85
Definition of Employer under Section 3(5) of ERISA – Association Health Plans

Dear Secretary Acosta:

We are writing to provide our comments regarding the Notice of Proposed Rulemaking (NPRM) that would greatly expand the existing definition of association health plans (AHPs). Under the proposal, AHPs would no longer have to represent a "bona fide group or association" of employers that share common interests. Instead, AHPs could be formed for the express purpose of providing health coverage in a region or metropolitan area (including those that cross state lines). The result would be that employees and their families could lose essential consumer protections and that adverse selection could drive up premiums and lower coverage rates in the non-AHP market. As members of the House Seniors Task Force, we are especially concerned about the impacts of the NPRM on those 50 years of age and older.

We share the NPRM's stated goal of providing employees with access to "affordable, quality health insurance," but we believe that this proposal to significantly expand AHPs fails to achieve that goal in several key ways. First, it defines affordability simply in terms of premium costs, instead of health care costs to employees and their families. Barebones insurance policies that fail to cover essential health benefits or to provide limits on out-of-pocket costs could leave many hardworking women and men to face unaffordable medical costs – forcing them to go without needed services or face medical bankruptcy.

Second, it could result in higher premiums, particularly for those who have chronic or pre-existing conditions. While the proposed rule would prevent underwriting based on health status, AHPs would be free to charge higher rates based on other considerations, including gender, group size, zip code, and occupation. Older workers could be charged more without limit, since the 3:1 age rating cap in the Affordable Care Act would not apply.

Third, it fails to guarantee quality coverage since AHPs are exempted from a wide range of consumer protections, while likely restricting state regulatory authority to ensure solvency and prevent fraud. The history of AHPs shows that those problems will almost certainly arise. A Government Accountability Office report found that between 2000 and 2002 alone, fraudulent AHPs resulted in 200,000 people losing coverage and left with $252 million in

unpaid bills.[1] The Department of Labor itself has targeted "unscrupulous promoters who sell the promise of inexpensive health benefit insurance, but default on their obligations," including an AHP that charged Washington State small employers $3 million in excessive fees and a South Carolina man who diverted nearly $1 million in premiums and left small businesses and churches with $1.7 million in unpaid claims.[2] Because the Department of Labor lacks the resources and ability to adequately oversee AHPs, which could be exempt from state regulation, many with AHP coverage could find themselves without recourse should they face non-payment of claims, fraud, rescissions, or other abuses.

Finally, AHP expansion would lead to market fragmentation that could have significant, negative impacts on the small group and individual markets.[3] AHPs could discriminate in marketing, set geographic boundaries that redline some higher-cost communities, or use benefit designs and formularies to discourage enrollment by small businesses with older workers, female workers, or workers with disabilities. The American Academy of Actuaries has warned that allowing AHPs to operate under different rules – as the NPRM proposes – could create serious adverse selection concerns and "challenge" the viability of many state markets. According to the Academy,

> "A key to sustainability of health insurance markets is that health plans competing to enroll the same participants must operate under the same rules. Although AHPs would be offered in competition with other small group and individual market plans, they could operate under different rules....Such a development would fragment the market as lower-cost groups and individuals would move to establish an AHP, and higher-cost groups and individuals would remain in traditional insurance plans. Such adverse selection would result in higher premiums in the non-AHP plans. Ultimately, higher-cost individuals and small group would find it more difficult to obtain coverage."[4]

Similarly, actuarial analysis of the District of Columbia small group market estimates that the fragmentation from NPRM could result in up to a 25.8% increase in premiums. .

The proposed rule would have serious consequences for those age 50 and older -- whether they receive AHP coverage or not. Benefits could be designed to avoid services that older workers may need – including rehabilitation, medications for diabetes and high

---

[1] "Employers and Individuals are Vulnerable to Unauthorized or Bogus Entities Selling Coverage," United States Government Accountability Office, GAO-04-312, February 2004.
[2] "Cheaper Health Plans Promoted by Trump Have a History of Fraud," *The New York Times*, October 21, 2017.
[3] The NPRM itself recognizes that possibility. "However, to the extent that AHPs prove particularly attractive to younger or lower cost individuals, they may contribute to some Exchanges' instability."
[4] "Issue Brief: Association Health Plans," American Academy of Actuaries, February 2017.

blood pressure, and mental health services. As mentioned, AHPs would be exempt from the 3:1 age rating limits in the Affordable Care Act, leaving them free to charge exorbitant premiums that would price health coverage out of reach. Employers seeking to avoid paying higher premiums could seek to avoid hiring older workers, at a time when Age Discrimination in Employment Act cases are already widespread. Older workers receiving coverage in the small group or individual markets could face higher premiums as a result of adverse selection, increases that would be compounded because of the 3:1 age rating provision in the ACA. In short, AHPs would be able to cherry pick younger, healthier enrollees at the expense of older Americans who would be faced with increased premiums, higher out-of-pocket medical costs, and a greater likelihood of becoming uninsured.[5]

We are deeply disturbed that the Department of Labor has issued this proposed rule despite acknowledging that it lacks the analysis to demonstrate that those problems will be resolved or the data to determine the impacts on workers, their families, and the health insurance market. Time after time the NPRM admits that the impacts on markets and costs are unknown or that problems have not been addressed. For example, the NPRM asks for comments on how to "require and promote actuarial soundness, proper maintenance of services, adequate underwriting and other standards relating to AHP solvency." Given the lengthy record of problems with those issues, it simply makes no sense to expand the number of AHPs now and look for consumer protections later.

Again, we believe that the proposed rule would undermine the goal of providing affordable, quality health coverage to our constituents, especially those age 50 and older, and we encourage you to withdraw it. Thank you for your attention to our comments, and we hope to work with you on more effective mechanisms to expand access to affordable coverage.

Jan Schakowsky
Member of Congress
Co-chair, Seniors Task Force

Doris Matsui
Member of Congress
Co-chair, Seniors Task Force

[5] Increased rates of uninsurance among older workers would also have negative consequences for Medicare. Research demonstrates that previously uninsured adults entering Medicare cost $1,000 or more in annual medical spending after age 65. "Use of Health Services by Previously Uninsured Medicare Beneficiaries," *The New England Journal of Medicine,"* July 12, 2007).

Lucille Roybal-Allard
Member of Congress
Vice-Chair, Seniors Task Force

Bobby Scott
Member of Congress

Lloyd Doggett
Member of Congress

Peter A. DeFazio
Member of Congress

Gene Green
Member of Congress

Joe Courtney
Member of Congress

Brian Higgins
Member of Congress

John Garamendi
Member of Congress

Jackie Speier
Member of Congress

Thomas R. Suozzi
Member of Congress

Ted Lieu
Member of Congress