

February 8, 2018

ATTN: RIN 1210-AB85  
Office of Regulations and Interpretations  
Employee Benefits Security Administration,  
Room N-5655, U.S. Department of Labor,  
200 Constitution Avenue NW, Washington, DC 20210

The American Society of Association Executives (ASAE) is a non-profit professional society representing over 39,000 individuals who serve in membership associations in every state in the Union. Our members work to advance our country and our world by improving the industries and professions they represent through advocacy, training, knowledge sharing and certification. There is an organization for every industry and profession in the United States. Over 63,000 are organized under IRS Code section 501(c)(6) as trade associations and business leagues, and thousands of others are organized under IRS Section 501(c)(3) as education, research and other professional societies. To avoid confusion, we refer to these types of entities as “membership organizations.”

We applaud the Department’s efforts to allow associations of all types to provide health insurance to members through Association Health Plans (AHPs). In fact, ASAE has advocated for AHPs for many years. The membership organizations we represent are uniquely suited to provide benefits to their respective members, since they understand the unique needs that drive their industries, factors that are not taken into account in the individual or SHOP exchanges.

In particular, small businesses that constitute the backbone of our national workforce face ever-increasing health insurance, if they can even afford to offer it at all. By forming AHPs, membership organizations will allow businesses to aggregate workforces and take advantage of the flexibility and lower costs that are currently available only to large employers. Small businesses could thus offer more competitive benefits, allowing them to compete with large employers and international competitors to retain and recruit employees, and expend more of their limited managerial resources on the important business of running their businesses.

Some commentators claim that allowing AHPs would flood the market with cheap, thinly funded plans that offer minimal benefits. We strongly disagree. We believe that legitimate membership organizations will not risk their goodwill and reputation with their members by offering substandard insurance plans, particularly to provide benefits that are not valued by the talented employees that they represent. Instead, the economies of scale that an AHP could produce would allow the association to offer more comprehensive coverage than members could afford on their own, implement realistic risk pooling, and minimize compliance cost. However, we do believe that there is some risk in allowing AHPs to be offered by newly formed organizations whose participating employers do not share a common interest or nexus through tailoring eligibility requirements in order to improperly discriminate, resulting in adverse selection and, in extreme cases, an actuarial death spiral.

We acknowledge that these issues are quite complex, and we appreciate the opportunity to provide comments that may clarify and strengthen some areas of the proposed rule.

1. The definition of an “association” in the proposal should not be limited to those organizations who have employers as members.

The proposed regulations assume that the members of an association are employers. However, according to ASAE’s research, more than half of associations have individual members. Examples include the American Bar Association, the American Society of Civil Engineers, and the Society for Human Resource Management, among many others. The proposed regulation should be clarified to allow the employers of association members to join the AHP offered by that association. This could be accomplished by stating that an AHP may be offered by any non-profit membership organization that has been granted an exemption from taxation pursuant to IRS Code Sections 501(c)(6) or 501(c)(3). Alternatively, the proposed regulation could allow employee-members of the organization to join of their own accord, regardless of employment formalities. Further, the regulations should state that the membership organization may form a subsidiary for the purposes of offering the plan.

2. Preemption of state health insurance laws and regulations must be clearly stated in the proposed rule.

The viability of an AHP will be severely constrained if the AHP must comply with the myriad of differing regulations in each state. While an AHP within a single jurisdiction might be successful, most industries and professions cross many state lines. To serve its members, the AHP would then have to offer several different plans, at different costs and with escalating compliance requirements. It might thus be more difficult for an AHP to achieve the economies of scale needed to thrive.

In addition, in order to enjoy the same advantages that a large employer has with a self-funded plan, the AHP should be considered the “employer” for the purposes of offering the health insurance, and should not be characterized as a MEWA. We acknowledge though, that it is critical for the success of an AHP that the AHP is adequately capitalized and that it maintain sufficient reserves. It may make sense to allow the home state of the AHP to reasonably regulate the AHP’s capitalization and reserve requirements. We believe that this level of single state control plus clear state preemption will provide the effective and predictable regulatory environment to allow AHPs to thrive.

As discussed in the attached memorandum, we believe that the Department of Labor has sufficient authority to design and implement a regulatory structure that will allow states to exercise their traditional consumer-protection roles without unduly frustrating ERISA’s purpose of promoting employee benefits by implementing uniform interstate standards of conduct<sup>1</sup> and this administration’s desire to minimize “governmental imposition of private expenditures required to comply with Federal regulations.”<sup>2</sup>

3. There should be additional restrictions on the formation of AHPs that do not have a membership nexus to an existing association.

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<sup>1</sup> S. Rep. No. 117 (1993)

<sup>2</sup> Executive Order 13771 (Jan. 30, 2017).

Much of the skepticism directed against AHPs stem from historical instances of bad actors offering thinly capitalized plans that collected premiums, but disappeared when claims came due. While the proposed regulations recommend some measures that may help prevent such fraudulent activity by a newly formed AHP, we are concerned that allowing anyone to form an AHP without a clear connection to an existing membership association could lead to the abuses of the past. Conversely, some of the proposed limitations will have the collateral effect of making well-intentioned AHPs less secure.

Existing membership associations have long-established relationships with their members, and are effectively controlled by their members. Associations offer benefits to their industries and professions and to our society beyond health insurance. An association would not risk its reputation and goodwill, and potentially its survival, by offering a thinly capitalized or substandard health plan. Without this nexus, a start-up AHP might not be as careful to ensure the success of the plan. We recommend that a legitimate, established association could be defined as an organization with the following attributes:

- Non-profit corporation with a federal tax exemption
- Established and operating for more than 5 years
- Average revenue or expenses of at least \$1 million annually over the last 5 years
- Substantial activities or programs other than the AHP
- Members that confirm membership at least annually, and who share a common industry, profession, field or demographic
- Members that have significant voting or participation rights, or whose interests are protected by other legal duties arising under state or federal law.

In addition, we suggest that any individual charged with the operation or management of an AHP be considered a fiduciary under ERISA. It is critical that those responsible for the AHP understand that they are obligated to protect the interests of the participants in the plan, and that they may be individually liable for the failure to carry out their fiduciary obligations.

We have attached a memorandum prepared with the assistance of the Pillsbury Winthrop Shaw Pittman LLP law firm which addresses some additional technical issues under the proposed regulations, as well as proposes legal mechanisms by which the above recommendations can be implemented.

Associations exist to improve the industries and professions that they serve; many have done so successfully for over a century; they can be counted on to do right by their constituents, perhaps in ways that have not been anticipated by policymakers. Again, we welcome the Department's proposed regulations since we believe that AHPs can help provide better benefits at lower costs, especially for small employers who have fewer choices every plan year. We appreciate this opportunity to comment, and are willing to assist in this effort in any way we can.



**The following technical memorandum supplements  
ASAE's comments on the Department of Labor's  
proposed rule to expand Association Health Plans (AHPs).**



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From: Jerald A. Jacobs, Esq.  
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Date: February 7, 2018

Re: Definition of Employer--Small Business Health Plans

This technical memorandum further discusses and expands upon the comments of the American Society of Association Executives (“ASAE”) regarding the proposed regulation entitled “Definition of Employer--Small Business Health Plans” published in the Federal Register on January 5, 2018 (the “Proposed Rule”).

This memorandum addresses four general areas of interest to our client:

- (I) Differentiating between types of plan sponsors;
- (II) Clarifying who is eligible to participate in an association health plan (“AHP”);
- (III) Suggesting revisions to the Proposed Rule that would minimize duplicative compliance costs; and

(IV) Proposing additional sub-regulatory actions that can be taken by the Department of Labor to supplement the impact of the Proposed Rule.

**I. Not All Associations are Created Equal**

Section 3(5) of the Employment Retirement Income Security Act of 1974 (“ERISA”) refers to a “group or association of employers acting for an employer.” Prior to the Proposed Rule, this concept was thought to entail the provision of benefits by a membership organization consisting of separate entities whose workforces have similar coverage needs and sufficient commonality of interest as to make “sham” health coverage mutually self-destructive. A clear example of this type of arrangement would be a trade association or a professional society that provided coverage as an ancillary benefit of membership to its constituency.

The Proposed Rule, however, would greatly expand the concept to include “*Ad hoc* AHPs” created for the primary purpose of providing health coverage. Because such AHPs would have no closer relationship to its participants than any other insurer, as a result, the proposed definition of “employer” now includes a number of substantive requirements intended to limit discrimination and prevent an actuarial death spiral. In the case of *Ad hoc* AHPs, these restrictions are critical. Yet, AHPs associated with nonprofit membership organizations (“Membership AHPs”) will already be heavily regulated under the Internal Revenue Code (as well as, potentially, state laws governing not-for-profit corporations and charitable entities) and will have aligned interests with the organizations’ due-paying members.

As a result, we urge the Department to distinguish between *Ad hoc* AHPs and Membership AHPs. We note that this suggestion is not without precedent, as many fields

of law, including federal election law, defer to IRS or state regulation when it comes to nonprofits.

#### Proposal One- Define Membership AHP

As discussed above, because Membership AHPs are already subject to regulation, the final rule should provide that *Ad hoc* AHPs should be subject to a higher tier of DOL oversight. However, in order to prevent regulatory evasion, the Department should issue clear guidelines as to what constitutes a Membership AHP. Factors that might be considered relevant include oversight by an organization that is:

- Exempt from taxation under Code Sections 501(c)(3) or (6);
- Subject to oversight by state charities bureaus or attorneys general;
- In good standing for five years; and/or
- Able to show non-premium revenue or programming expenditures in excess of \$5 million.

As an alternative approach, a Labor determination letter program could be implemented that would allow the Department to review individual plans to ensure that there are sufficient participant protections.

#### Proposal Two- Exempt Membership AHPs from Paragraph (d) of the Proposed Rule

Membership AHP should be able to tailor eligibility and coverage to industry-specific considerations even if there is an impact on the risk pool because professional societies and trade associations, unlike *Ad hoc* AHPs, have a natural constituency with common interests. Because coverage will be linked to membership in the parent organization, plans are limited in their ability to manipulate plan terms or marketing efforts to discriminate or otherwise manipulate the risk pool. Conversely, by exempting

Membership AHPs from paragraph (d), employers will be free to address industry-specific considerations without having to comply with one-size-fits-all protections. Accordingly, we urge the Department to exempt Membership AHPs from all or a portion of paragraph (d) of the Proposed Rule.

Proposal Three- Allow Membership AHPs to Work Closely with Insurers

To prevent regulated insurers from forming controlled AHPs in order to evade state regulation, the Proposed Rule restricts certain joint ventures between insurers and AHPs. However, for many of the same reasons that the Marketplace Reforms are relaxed for large group employers with sufficient leverage to negotiate at arm's length with insurers, Membership AHPs that are sufficiently sophisticated and independent should have additional flexibility to allocate risk and coordinate resources with traditional insurers, particularly if the organization does so as a fiduciary.

**II. Expanding the Pool of Eligible Individuals**

According to the preamble, one of the primary motivations behind the Proposed Rule is to allow similarly situated individuals to qualify for the same regulatory treatment as large employers. In fact, for the first time “owner only” plans can be treated as ERISA plans, and small group employers treated as large group employers. Although this will provide much relief to small employers, the Proposed Rule should apply to a greater variety of service providers.

Proposal Four- Clarify Whether Employees May Join Independent of Employer

The Proposed Rule treats partners as common-law employees of their own business, yet traditional employees are not entitled to similar “dual status treatment.” “Working Owners” should include individuals engaged in the trade or business of

providing services as employees<sup>1</sup>, so long as they satisfy the hour requirement and their common-law employer does not offer them other coverage. We propose an alternate definition of *Working Owner* that includes any individual:

(i) Who has an ownership right of any nature in a trade or business, whether incorporated or unincorporated, including partners, **individuals engaged in the trade or business of performing services as an employee**, and other self-employed individuals; [and]

(ii) Who is earning wages or self-employment income from the trade or business for providing personal services to the trade or business (**including an employee receiving wages from an employer on account of a trade or business of providing services as an employee of such employer**);

....

(iv) Who either:

....

(B) Has earned income from such **activities trade or business** that at least equals the working owner's cost of coverage for participation by the working owner and any covered dependents in the **group association** health plan **sponsored by the group or association in which the individual is participating**.

#### Proposal Five- Clarify that Nonprofits are Trade or Businesses

For various purposes, the Proposed Rule refers to a “trade or business.” Although a broad classification, it presupposes that both the service recipient and the service provider have a profit motive. However, many working-founders of nonprofits and other service providers have noneconomic motives. The rule should clarify that any service provider, unless engaged solely in passive activities, may be covered by an AHP so long as it satisfies the commonality tests.

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<sup>1</sup> IRC Sections 62 and 1402(c)(3).

### **III. Eliminating Administration Issues**

The Proposed Rule technically allows small businesses to aggregate compliance costs. However, the practical effect will be limited because the Proposed Rule imposes administrative, recordkeeping, and procedural requirements on both the employer and the AHPs, while still requiring individual employers to maintain a separate welfare plan.

#### Proposal Six- Allow ERISA Obligations to Satisfy Control Requirements

The Proposed Rule does not provide clear guidance relating to how small employers and Working Owners may satisfy the control requirements. We suggest that this may be easily resolved by mirroring Code Section 501(c)(9) and finding that any AHP overseen by a named fiduciary (as defined in ERISA) is considered under the control of its participants, without regard to who selects the committee members.

### **IV. Ensuring Smooth Interstate Operations**

The Proposed Rule expressly provides that AHPs will be considered MEWAs, and therefore subject to state regulation. Although conflict preemption still technically applies, under the current state of the law, each state may implement onerous, if not outright impossible-to-satisfy, limitations on in-state MEWA operations. However, the Department of Labor has been specifically granted the authority to strike a balance between each state's interest in ensuring that insurance (or insurance-like) benefits are able to be paid when they come due, with Congress' clearly expressed interest in ensuring that companies participating in interstate commerce are not subject to conflicting state demands. These powers include the ability to issue regulatory and subregulatory guidance, defend federal interests in court, and issue exemptive relief.

### Proposal Seven- Find that AHPs are Literally Single Employer Plans

The Proposed Rule provides that, for purposes of satisfying the Employment Nexus Requirement and Marketplace Reforms, the AHP is the “employer” of the employees of its employer-members. However, the preamble to the Proposed Rule counterintuitively states that for purposes of determining whether a plan is a MEWA, each employer-member is considered a distinct employer.

Yet, if the AHP, or a nonprofit membership organization affiliated with it, were to be treated as “a group or association of employers acting for an employer,” and therefore a single employer of all participants, the special rules pertaining to MEWAs would not apply, although states would retain the powers reserved to them under the Savings Clause. Although the preamble claims that doing so would conflict with legislative intent, nothing in the Congressional record reveals such an intent. Furthermore, there is nothing novel about treating a plan available to more than one employer as a single employer plan.

As a result, we suggest that the DOL use its interpretative power to determine that for purposes of both ERISA Sections 3(5) and (4), *employer* includes a group or association of employers acting for an employer. As a result, an AHP with an indirect employment connection between the participant and the sponsor, such as a Membership AHP, should constitute a single employer plan.

### Proposal Eight- Treat AHPs as MEWAs with Multiple SEP Subscribers

The MEWA rules explicitly distinguish between a MEWA and any plans or programs that are funded or administered by participating, subscribing, or otherwise

using a MEWA.<sup>2</sup> As a result, even if the AHP itself were to be considered a MEWA, so long as each member-employer or Working Owner creates a separate arrangement and meets minimum filing requirements, it could may constitute a single employer plan that is at least a partially self-funded plan, limiting the ability for the host state to regulate each sub-arrangement. The AHP itself would serve as stop-loss protection for the sub-arrangement.

Although sub-regulatory guidance takes the position that state discretion to regulate stop-loss coverage is not limited by ERISA,<sup>3</sup> this is not supported by primary law and the DOL could rescind this policy and explicitly provide that because an AHP is subject to ERISA, the states are prohibited from treating the stop-loss protection provided by such as plan as a form of insurance.

#### Proposal Nine- Grant Exemptive and Interpretative Relief

The DOL has been granted, but largely not utilized, extensive power to shape interstate operations of MEWAs. Along with retaining the authority to determine insurance status,<sup>4</sup> the Secretary is authorized to determine, individually or by class, that any self-funded MEWAs will be treated as fully insured for purposes of the preemption analysis.<sup>5</sup> However, in the absence of affirmative DOL guidance, some states have applied definitions of “fully insured,” “not inconsistent with ERISA,” or “standards requiring the maintenance of specified levels of reserves” that are so broad as to effectively provide that federal law is trumped by any state law or regulation impacting MEWAs, even if the state has no intention of ensuring participant protection or plan

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<sup>2</sup> ERISA Section 514(6)(C).

<sup>3</sup> DOL Tech. Rel. 2014-01 (Nov. 6, 2014).

<sup>4</sup> ERISA Section 514(b)(6)(D).

<sup>5</sup> ERISA Section 514(b)(6)(B).

solvency. As a result, states are permitted to impose “insurance regulation” with no other purpose than interfering with an employer’s ability to operate across state lines and the federal government’s efforts to minimize the impact of rising health coverage costs on interstate commerce.

In order to ensure that interstate employers are able to provide benefits to their entire workforce, the Department should:

- Deem certain Membership AHPs with sufficient reserves to be treated as fully insured plans and provide a method for AHPs to be certified;
- Replace the MEWA Enforcement Handbook with more extensive guidance regarding what types of state regulations *are reasonably related to solvency and funding requirements*, limiting the ability of states to insert poison pills into procedural protections;
- Propose a definition of “fully insured” that includes small employers with notional retained losses, prefunding obligations, or that are subscribed to a reliable payer; and
- Clarify that in light of 2009 amendments to the ERISA imposing health coverage and benefit obligations on employers, state laws that have the effect of making it logistically impossible for employers to offer health coverage to employees are *inconsistent with ERISA* and therefore preempted even in the case of a self-funded MEWA.