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

The New York State Chiropractic Association (NYSCA) appreciates the opportunity to submit comments regarding the Department of Labor's (Department) proposed rule, Definition of Employer Under Section 3(5) of ERISA-Association Health Plans RIN 1210-AB85.¹ The NYSCA, an affiliate of the American Chiropractic Association (AmCA) is the largest chiropractic organization representing doctors of chiropractic in New York state.

Under the federal Employee Retirement Income Security Act (ERISA) of 1974, association health plans (AHPs) are classified as Multiple Employer Welfare Arrangements (MEWAs), and they are generally subject to state insurance regulation pursuant to 29 USC § 1002(40). The extent of state jurisdiction over a MEWA is set forth in 29 USC § 1144(b)(6). Specifically, non-fully insured AHPs are currently subject to any state insurance law so long as that state law is not inconsistent with ERISA. Therefore, non-fully insured AHPs *should be subject to state benefit mandates* under current federal law. This would include state insurance equality laws -- those, for example, that prohibit insurers from excluding coverage for services provided by a licensed chiropractor if those services are within the scope of the chiropractic enabling law in New York and which are also covered if performed by a licensed physician or other provider. (See, for example, New York State (NYS) Insurance Law §§ 3216(i)(21), 3221(k)(11) and 4303(y), and NYS Public Health Law § 4406(1).) Patients nationwide benefit from these important consumer protection laws by being able to choose (using this example) chiropractic services instead of costlier and potentially risky pharmacological treatments.

The NYSCA is deeply troubled that by exempting non-fully insured AHPs from state consumer protection and insurance laws such as the NYS insurance equality law, chiropractors and their patients will lose even more of the protection of state law that has already been significantly eroded by ERISA. The result is that patients would have no protection from coverage discrimination by AHPs.

The NYSCA supports completely the role of state insurance commissioners as the first line of defense against insurance abuses. However, as outlined by the American Academy of Actuaries,² the viability of many state markets would be challenged because AHPs, under the proposal, could operate under separate rules than those competing plans that must follow existing state law and

regulations. For this reason, the National Association of Insurance Commissioners (NAIC), along with numerous business and other interest groups, have opposed proposals to expand the use of AHPs, particularly proposals that would exempt AHPs from state regulation.³ It is worth noting that during previous congressional debate on this issue, more than 1,000 state government, business, labor, consumer and provider groups opposed the expansion of AHPs nationwide.⁴

The NYSCA is also concerned that this new scheme would not require insurers to comply with many patient protections called for under the Affordable Care Act, such as essential health benefits (EHBs). Under New York's robust exchange – the New York State of Health -- access to chiropractic care and treatment is considered a covered, essential benefit. Under the proposed regulation, however, a bare-bones plan could be designed that could siphon off healthier patients and ultimately lead to higher premiums for consumers and employers who buy plans in the traditional insured markets. In an earlier proposed rule, the American Chiropractic Association expressed apprehension that undermining the current EHB structure would create a patchwork of standards across the country and that there must be continued federal interaction on this vital component of the Affordable Care Act.⁵ Anything less may result in the unintended consequence of patients losing important health benefits.

Yet another troubling provision in the proposed rule, is one that would exempt insurers who market these new AHPs from spending at least 80 percent of premium revenue on actual medical care. The current 80/20 rule, or Medical Loss Ratio, called for under the Affordable Care Act,⁶ has bipartisan support and ensures patients that at least 80 percent of their premiums are going for actual healthcare costs and not in the pockets of corporate executives. Eliminating this rule could result in higher premiums, and insurers would be free to spend unchecked on extraneous overhead items.

In addition, the proposal to define the terms “working owner” schizophrenically as both an employer and an employee simultaneously, do not appear anywhere in ERISA's definitions, 29 USC § 1002. ERISA defines the term “employer” (29 UCS 1002(5)) and “employee” (29 USC 1002(6)) separately, and ERISA has applied to any employee benefit plan . . . established or maintained by “any employer” . . . or “any employee organization” or both (29 UCS 1003(a)). Furthermore, ERISA defines an “employee welfare benefit plan” and “welfare plan” as “any plan, fund or program” . . . “established or maintained by an employer or by an employee organization, or by both” . . . “for the purpose of providing for its participants or their beneficiaries” . . . “medical, surgical, or hospital care or benefits . . .” (29 USC 1002(1)). ERISA further defines a “participant” as “any employee or former employee of an employer . . . or employee organization” (29 USC 1002(7)). How does one become a former employee of themselves – as a working owner/employer? This definitional sleight of hand appears to upend more than forty (40) years of statutory and regulatory administration of ERISA and appears arbitrary and capricious.

Like forum shoppers, the association health plans called for under this proposal, will create a “race to the bottom,” allowing AHPs to choose their regulator. This is not sound policy for the consumer or the provider. The Department needs to scrap this proposal and instead offer a viable solution that maintains the states' regulatory and oversight authority vital in their traditional role in protecting patients and insurance markets. It is New York State Chiropractic Association's view that while the aim of providing more coverage to more people is indeed laudable, the pure notion that state protections, many of which patients have spent decades achieving, and which would be suddenly wiped out by this proposed rule, is simply unacceptable.

The NYSCA appreciates the opportunity to provide comments on the proposed rule. We believe that taking another look at this issue while ensuring state oversight of all plans marketed within their states

will ensure patients receive high-quality care that is responsive to their needs and preferences, at a cost both they and the government can afford. If you have any questions regarding our comments or need more information, please contact Christopher Piering, DC, NYSCA Communications Secretary at: comm.secretary@nysca.com.

Respectfully,

Jason Brown, DC
President, NYSCA

cc: NYSCA Board of Directors
NYSCA House of Delegates
NYSCA Legislative Counsel

JB:kck

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- ¹ Definition of Employer Under Section 3(5) of ERISA-Association Health Plans <https://www.regulations.gov/document?D=EBSA-2018-0001-0001>
 - ² American Academy of Actuaries, Issue Brief, Association Health Plans, February 2017 <http://www.actuary.org/content/association-health-plans-0>
 - ³ National Association of Insurance Commissioners, Letter to Congress http://www.naic.org/documents/government_relations_170712_ltr_small_business_health_plan_prov_bcra.pdf
 - ⁴ Congressional Record May 13, 2004, p. H2961 <https://www.congress.gov/crec/2004/05/13/CREC-2004-05-13-pt1-PgH2951.pdf>
 - ⁵ Comments of the American Chiropractic Association, re:CMS-9930-P, Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2019 <https://www.acatoday.org/LinkClick.aspx?fileticket=DOmXReD-Awg=&portalid=60>
 - ⁶ Rate Review & the 80/20 Rule <https://www.healthcare.gov/health-care-law-protections/rate-review/>