



March 6, 2018

Office of Regulations and Interpretations  
Employee Benefits Security Administration  
Room N-5655  
U.S. Department of Labor  
200 Constitution Avenue, N.W.  
Washington, DC 20210

Re: Definition of Employer – Small Business Health Plans  
RIN 1210-AB85 (the “Proposed Rule”)

To Whom It May Concern:

On behalf of its parent company, the Association of Washington Business (“AWB”), Forterra, Inc. welcomes the opportunity to comment on the Proposed Rule issued by the Department of Labor, Employee Benefits Security Administration (the “Department”) relating to the definition of “employer” under Section 3(5) of the Employee Retirement Income Security Act of 1974 (“ERISA”). AWB has a long history and successful track record of providing affordable, high quality health coverage to, and expanding the available health coverage opportunities for, its small employer members and their employees and families through its association health plan (“AHP”). Because of its extensive experience in the State of Washington AHP market, AWB believes it can offer valuable insights into how the AHP market actually works and how AHPs would be affected by the Proposed Rule.

While AWB supports the proposed expansion of the definition of employer in Section 3(5) of ERISA for the intended purpose of providing additional opportunities for small employers to band together to obtain health insurance coverage, we believe the imposition of the new non-discrimination requirement in the Proposed Rule would disrupt coverage being offered to small employers through existing AHPs that have operated successfully in the State of Washington for more than two decades. This disruption would cause hundreds of thousands of Washingtonians to lose the health insurance coverage they have enjoyed since 1995. Accordingly, AWB requests that the Department reconsider imposing the new non-discrimination requirement or provide a regulatory exemption from its application for AHPs currently operating in the State of Washington.

**A. BACKGROUND ON AWB AND THE WASHINGTON AHP MARKET**

By way of background, the State of Washington has had a very robust AHP market since the State enacted bipartisan association health plan legislation in 1995 to increase health coverage options for small employers who could not afford the community-rated products otherwise available to them. These AHPs are fully-insured and comply with state and federal benefit

mandates, as well as consumer protections such as guaranteed issue and renewal of coverage. Dozens of fully-insured AHPs have been operating in Washington for more than two decades, covering tens of thousands of small businesses, without financial impairment or any threat to the safety and security of these plans. According to historical data from the state's insurance department, more than 400,000 employees and their family members have been enrolled in AHPs.

AWB was formed in 1904. It is the State of Washington's largest and oldest statewide business association, representing nearly 7,000 employers who have 700,000 employees. AWB operates two AHPs for the benefit of its employer members. One has been in existence since 1995 and the second was created in 2014 in response to changes resulting from interpretations of federal law after the enactment of the Affordable Care Act (the "ACA"). For purposes of these comments, the two separate plans offered by AWB will be referred to collectively as a single AHP.

As of January 1, 2018, the AWB AHP covers nearly 2,300 small employers and insures approximately 24,000 employees and their dependents. AWB member employers value their AHP coverage, as historical retention rates are extremely high. For example, the retention rate for the 2018 plan year was 88 percent. Additionally, AHPs in Washington provide a meaningful choice in the market for small employers, as more than 40 percent of those employers did not offer health care prior to purchasing coverage through AWB. Clearly, these are plans that Washington small employers want.

In response to prior Department guidance suggesting an association was restricted from being treated as an "employer" under Section 3(5) of ERISA unless its membership was limited to a single specific industry, AWB and other associations reconstituted their AHPs into industry-specific plans. This resulted in increased regulatory compliance costs completely devoid of an enhancement of existing benefits or protections for the members participating in these AHPs, which continued to be fully-insured by highly regulated, financially viable health insurance carriers. As a result of these changes, AWB's AHP is currently managed by a board of trustees representing nine specific industry classifications of AWB members, industries that have been represented by AWB for its more than 100 year history. Those classifications are manufacturing, professional services, retail/wholesale, hospitality, construction, agriculture, communications, technology, and transportation. Trustees are elected by the industry classification members they represent and are responsible for, among other things, providing general direction as to the design of the health insurance coverage options offered to their industry classification members through the AHP.

Since 1995 Washington's insurance code, in pertinent part, has expressly exempted small employers purchasing health coverage through AHPs from being considered "small employers," exempting them from community rating requirements otherwise applicable to the small group market. In 2006, the Washington insurance commissioner erroneously asserted that AHPs violated the non-discrimination provisions of Section 702 of ERISA by rating each respective participating employer according to aggregated claims experience, instead of rating the collective claims experience of all participating employers. The commissioner's position was rejected by the Superior Court in a 2007 decision. The commissioner again attempted to impose a similar position on Washington AHPs after the ACA was enacted, and, again, the position was rejected by the commissioner's chosen administrative law judge. As a result, AWB's AHP has been treated as a

large group plan and AWB has experience rated each participating employer since 1995, consistent with applicable Washington law. AWB's experience rating practices are also consistent with the September 1, 2011 CMS Insurance Standards Bulletin, which treats an association that qualifies as a single employer under Section 3(5) of ERISA as a large group for purposes of the ACA.

AWB members who participate in the AWB AHP receive company-specific attention commensurate with their AWB membership and service levels that correspond to their specific workforce needs. They also receive benefits of large employer status through an experience rating adjustment applied to each respective participating employer. AWB has learned that using this risk adjustment mechanism helps keep the base rates for the entire pool as low as possible. All of the claims of the participating employers are aggregated in the initial rating process. That produces a "manual rate." The "manual rate" is then adjusted for each participating employer based on that participating employer's risk which establishes the rate charged to each participating employer for coverage provided to the employer's employees and their eligible dependents. Without this rating methodology, AWB would not be able to offer the benefit-rich, competitively-priced products it does.

It is very important to note that no individual employee is singled out and rated based on his or her own claims, or the claims of his or her dependents. In addition, AWB does not dictate to employers how much they must charge their employees for coverage, other than requiring the employer to bear at least 75% of the cost of employee-only coverage.

As a large group under the ACA, and as provided under Washington's insurance code, AWB is subject to guaranteed issuance, which means its members are never denied the opportunity to purchase coverage regardless of the medical history or health status of their employees. AWB does not offer coverage to self-employed individuals or businesses with fewer than two employees and has no intention of doing so in the future.

All coverage provided through AWB's AHP is underwritten on a fully-insured basis by Premera Blue Cross ("Premera"). Premera is one of the largest health insurers operating in the State of Washington. In addition to insuring AHPs offered by AWB and other associations, Premera is one of the largest providers of health insurance coverage in the Washington small group market. Because it is treated as a large group, AWB's AHP is not required to offer the ACA essential health benefits. However, all of the plans offered through AWB's AHP voluntarily include these benefits and even go beyond what the federal and state governments mandate in the traditional small group market. Additionally, provider networks offered through AWB's AHP are some of the best and broadest available in the market. Small employers buy these plans despite being exempt from any obligation to do so because they offer affordable, high quality programs with benefits employees value and service that is focused on their needs. AWB members have not requested, and AWB does not offer, any reduced-benefit or "skinny" plans. Unless its members direct otherwise, AWB has no present intention to offer these types of plans even if the Proposed Rule is finalized.

Small employers in Washington have choices in both the small group and AHP markets. Brokers typically present small employers with alternatives from both of these markets. Employers then decide, based on cost, benefits, service, and overall value, which health insurance

product is the best fit for their specific workforce and their dependents. We believe this longstanding history of choice going back to 1995 (when the Washington legislature responded to small employers' demand for affordable alternatives to the community rated small group market) has led to one of the few sustained examples of health care reform success. By providing market choice, AHPs in Washington have continuously demonstrated to small employers (who are not required to provide any coverage to their employees to begin with) that the coverage offered through AHPs has value and that this type of market works.

The Proposed Rule suggests that allowing AHPs to experience rate small employers participating in AHPs threatens to disrupt the small group market in many states. However, experience-rated AHP coverage has been offered to small employers in Washington for many years, and despite repeated predictions to the contrary, no evidence exists that the Washington small group market has been adversely affected by experience rating in AHPs at the participating employer level. The Washington small group community rated market has grown significantly over the past three years and is now larger than the AHP market. The last small group market study performed by America's Health Insurance Plans ("AHIP") showed that Washington was the fifth most affordable state in the nation for small employer coverage. This study was also undertaken when AHP enrollment was at an all-time high. This data provides solid evidence that AHPs do not cause the cost of small group coverage to increase. In fact, it suggests the opposite. Based on publicly available information from the Washington Office of Insurance Commissioner, approved rate increases in the Washington small group market from 2013 through 2018 averaged only 3.6% per year.

**B. AWB SUPPORTS THE EXPANSION OF AHPs BUT IS CONCERNED ABOUT THE NEW NON-DISCRIMINATION REQUIREMENTS**

AWB welcomes the expansion of the commonality-of-interest test in the definition of "employer" under Section 3(5) to include "[e]mployers having a principal place of business in a region that does not exceed the boundaries of the same State...." That relaxation of prior Department guidance on the commonality-of-interest test will benefit AHPs (like many of those in the State of Washington) that were originally established by broader based associations that have since had to adjust their governance structure and operations to comply with prior Department guidance. AWB believes the narrow focus of the commonality-of-interest test in prior Department guidance served no compelling business or regulatory purpose, particularly as applied to fully-insured products.

However, AWB has serious concerns about the new non-discrimination requirement in the Proposed Rule and believes it could lead to a reduction, not an expansion, of health care coverage for small employers. Prohibiting AWB and other Washington AHPs from experience rating each small employer would destroy the Washington AHP market and deprive hundreds of thousands of Washingtonians of the health coverage they have enjoyed for two decades. Further, as explained in more detail in the memorandum attached to this letter as Exhibit A, AWB believes there is no compelling legal or policy basis for applying the non-discrimination requirements of Section 702 of ERISA to AHPs.

Eliminating the new non-discrimination requirement would allow AHPs to offer a broad range of fully insured products to small employers without disrupting the small group market. The Department has already acknowledged in the Proposed Rule the perceived benefits associated with providing more coverage options for small employers, stating “[a] principal objective of the proposed rule is to expand employer and employee access to more affordable, *high quality* coverage.” (Emphasis added).

AWB wholeheartedly agrees with this objective; however, the current version of the Proposed Rule would result in a reduction of the quality of health benefit plans being made available in the small group market by forcing AHPs to compete with the small group market on the basis of benefits, not pricing (creating an incentive for a “race to the bottom” to see which AHPs can offer the skinniest benefit packages at the lowest price).

Eliminating the new non-discrimination requirement and allowing AHPs to continue to be underwritten based on the aggregated claims experience of each participating small employer would allow AHPs to continue to offer the same type of robust, comprehensive, fully-insured health coverage offered in the small group market at a cost that continues to be more affordable for many of those small employers, with service levels more typically commensurate with large employer coverage. In Washington, that would provide a more level playing field for small employers to compete for employee talent with larger employers, all of whom already enjoy maximum flexibility in designing their group health plans.

In light of this, AWB requests that the Department consider modifying the Proposed Rule so that AHPs in the Washington market could continue to operate as they have for the last two decades. Specifically, AWB is asking the Department to adopt a grandfathering rule pursuant to which fully-insured AHPs in existence prior to January 5, 2018 (the publication date of the Proposed Rule) would be subject to the non-discrimination requirements in Section 2510.3-5(d) *without regard to paragraph (d)(4)*. This would allow those grandfathered AHPs to continue their current practice and experience rate each separate employer member of the AHP (including new members who purchase coverage after January 5, 2018). As a condition to being exempt from the application of paragraph (d)(4), a grandfathered AHP would be prohibited from accepting as a member, or offering coverage to, any employer with fewer than two employees. This would eliminate the risk of discrimination against any single employee or self-employed individual.<sup>1</sup>

Our view is that providing this requested grandfathered relief should not be perceived as inconsistent with Section 702 of ERISA and the underlying regulations as set forth in the preamble to the Proposed Rule. To address any concern in that regard, we respectfully request that the Department reconsider its initial conclusions regarding the application of Section 702 of ERISA to AHPs in light of the legal analysis in Exhibit A. We believe the Department will then conclude that current law does not necessarily compel the application of the nondiscrimination requirements

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<sup>1</sup> AWB is not suggesting the Proposed Rule be modified in this manner for newly-created AHPs, either as to the non-discrimination requirement or as to the ability to offer coverage to self-employed individuals. Newly-formed AHPs would be allowed to offer coverage to self-employed individuals or one-life groups in the State of Washington or any other market only if they were willing to comply with the Proposed Rule’s non-discrimination requirement in its entirety.

of Section 702 of ERISA to AHPs in the manner set forth in the Proposed Rule. If the Department nonetheless chooses to prohibit prospectively the separate underwriting of specific employers participating in a non-grandfathered AHP, we would suggest that any final rule should clarify that the Department is adopting, **as a policy matter**, a nondiscrimination requirement similar to that of Section 702 of ERISA and that this decision is not compelled by Section 702 of ERISA.

The greatest benefit of grandfathering existing AHPs is that it would truly maximize the options available to small employers. In a market like Washington, it would allow small employers to choose among: (a) community-rated comprehensive benefit plans offered in the small group market; (b) experience-rated comprehensive benefit plans in the existing AHP market; and (c) less comprehensive benefit plans experience-rated as though all employers participating in the AHP were a single employer. AWB's proposal furthers the Department's stated goals of increasing health insurance options for small employers, placing those small employers on a level playing field vis-à-vis large employers, providing self-employed individuals with access to the group market and minimizing the risk of discrimination against *individuals* who have adverse health status or claims experience.

Again, we thank the Department for considering our comments. On behalf of the hundreds of thousands of Washingtonians who currently purchase health coverage through existing Washington AHPs, it is our fervent hope that the Department modifies the Proposed Rule so that those Washingtonians do not lose the health coverage they have come to value and expect. Should the Department have questions about the information included in this letter or need any additional information, please feel free to contact me.

Sincerely,

A handwritten signature in black ink that reads "Debra Brown". The signature is written in a cursive, flowing style with a horizontal line extending from the end of the name.

Debra Brown  
President

## **EXHIBIT A**

### **LEGAL AND POLICY ARGUMENTS IN SUPPORT OF THE ASSOCIATION OF WASHINGTON BUSINESS' COMMENT LETTER**

As a condition to its expansion of the definition of the term “employer” under Section 3(5) of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”) in RIN 1210-AB85 (the “Proposed Rule”), the Department of Labor (the “Department”) would require association health plans (“AHPs”) to comply with certain nondiscrimination requirements, including a prohibition against experience rating each separate small employer member of the AHP. The Department’s primary basis for imposing this nondiscrimination requirement is its interpretation of how Section 702 of ERISA should be applied to AHP coverage, although it also advances certain policy arguments in support of the nondiscrimination requirement. AWB believes the Department is misinterpreting Section 702 of ERISA and that the Proposed Rule’s nondiscrimination requirement should be eliminated or modified for the legal and policy reasons explained in AWB’s letter to the Department dated March 6, 2018 (the “Comment Letter”) and in this Exhibit A to the Comment Letter.

1. The Proposed Rule misinterprets or misapplies Section 702 of ERISA.

The Department proposes imposing a non-discrimination requirement that would prohibit an insurer from separately experience rating each small employer participating in an AHP. In support of this requirement, the Department relies on the non-discrimination rules in Section 702 of ERISA. AWB believes this reliance on Section 702 of ERISA is misplaced.

As the Departments states in the preamble to the Proposed Rule:

“The term “employer” is defined in section 3(5) of ERISA as ‘. . . any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.’ Thus, ERISA defines the term “employer” to include the “direct” (or common law) employer of the covered employees or “any other person acting indirectly in the interest of” the common law employer.”

As this last quoted sentence articulates, just because an association is treated as an “employer” under Section 3(5) of ERISA does not also mean that each common law employer whose employees participate in an AHP is **not** also an employer for purposes of ERISA. The question becomes which of the two “employers” (the association or the common law employer) is treated as such for purposes of a particular provision of ERISA.

The Department has previously acknowledged that an association acting as the “employer” under Section 3(5) of ERISA is not necessarily the “employer” for all purposes of ERISA. For example, even though an association may be treated as an “employer” under Section 3(5) of ERISA, each common law employer participating in an AHP is treated as an “employer” for purposes of determining whether the AHP is also a multiple employer welfare arrangement under Section 3(40) of ERISA. *See* DOL Advisory Opinion 2017-02AC.<sup>2</sup> Thus, a determination that an

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<sup>2</sup> Similarly, the Internal Revenue Service treats each common law employer participating in an association health plan that is also a MEWA as the “employer” for purposes of determining whether the small employer exception under COBRA applies.

association is the “employer” under Section 3(5) of ERISA does not compel the Department to treat the association as the “employer” under other provisions of ERISA, including Section 702.

Section 702(b)(1) of ERISA prohibits a group health plan or health insurance issuer from requiring “any individual” to pay a premium or contribution which is greater than the premium or contribution for a similarly-situated individual enrolled in the plan on the basis of any health status related factor of the individual or the individual’s dependents. As a result, on its face the statute is intended to prevent discrimination against specific individuals, not groups of individuals.

This is consistent with the regulations under Section 702 of ERISA as those regulations apply to health insurance coverage issued to employers. Specifically, Example 1 of 29 CFR § 2590.702(c)(2)(iii) provides:

“(i) Facts. An employer sponsors a group health plan and purchases coverage from a health insurance issuer. In order to determine the premium rate for the upcoming plan year, the issuer reviews the claims experience of individuals covered under the plan. The issuer finds that Individual F had significantly higher claims experience than similarly situated individuals in the plan. The issuer quotes the plan a higher per-participant rate because of F's claims experience.

(ii) Conclusion. In this Example 1, the issuer does not violate the provisions of this paragraph (c)(2) because the issuer blends the rate so that the employer is not quoted a higher rate for F than for a similarly situated individual based on F's claims experience....”

To the extent an insurance company experience rates a participating small employer, the premium rates are established for that employer’s entire employee population based upon the aggregated claims experience of that employer, not for any particular employee. The rates for coverage apply at the common law **employer** level, not at the individual **employee** level. Nothing in Section 702(b)(1) suggests that an insurance company is prohibited from charging an **employer**

(regardless of how the “employer” is defined) separate rates for different groups of the employer’s workforce. Instead, Section 702(b)(1) prohibits the insurance company and the employer from charging a specific **employee** a different amount based on that employee’s or one of the employee’s dependent’s health status.

In the preamble to the Proposed Rule, the Department articulates this requirement as generally providing “that plans may, subject to an anti-abuse provision for discrimination directed at individuals, treat participants as distinct groups if the groups are defined by reference to a bona fide employment-based classification consistent with the employer’s usual business practice. As stated in the HIPAA/ACA health nondiscrimination rules, whether an employment-based classification is bona fide is determined based on all the relevant facts and circumstances, including whether the employer uses the classification for purposes independent of qualification for health coverage (for example, determining eligibility for other employee benefits or determining other terms of employment).”

The clear intent of the Section 702(b)(1) of ERISA is to prohibit the targeting of specific employees directly or indirectly. In that regard, 29 CFR § 2590.702(d) recognizes that an employer may set different employee contribution rates for health coverage for different classifications of employees, as long as the employer does not target a **particular employee** for an increase in premiums by including that employee in an arbitrary classification of employees such that the employee is effectively singled out for the premium increase. An employer may not establish arbitrary classifications of employees or create a new employee classification as a subterfuge to charge a targeted employee a higher premium. The purpose of the regulations is to

prohibit the **targeted employee** from being treated differently. It is not intended to prohibit an insurer from treating the employer differently with respect to a broader group of employees.

In the context of AHPs, there is perhaps no less arbitrary a classification than each separate, unaffiliated common law employer. An employee's common law employer represents the quintessential "bona fide employment-based classification." These common law employers separately employ their own employees, make their own hiring and firing decisions, set all terms and conditions of their employees' employment and establish eligibility for other employee benefits entirely independent from other common law employers in the AHP. More important, it is virtually impossible for one common law employer to coordinate with other unaffiliated employers to discriminate against a targeted employee with regard to health insurance premiums or contributions.

If an employer participating in an AHP has higher claims experience, and if the insurer experience rates that employer and determines that the employer should pay a higher premium overall because of anticipated higher claims resulting from the health status of the group, nothing the insurer has done has any effect on how any employee is necessarily treated under the health plan. The rates charged to the employer do not necessarily affect how much any employee pays for coverage, regardless of his or her medical condition. Only if the participating employer charges an employee with a serious medical condition more for coverage than it charges to its other employees would there be a violation of Section 702 of ERISA. This risk can be addressed by clarifying, to the extent such clarification is even necessary, that each employer participating in an AHP is required to establish employee contribution rates on a uniform basis for its employees.

As a matter of accepted practice, each small employer participating in an AHP generally establishes how much that employer's employees pay for health coverage. Under Section 702 of ERISA, each such employer is already prohibited from establishing the contribution rate for an individual employee based on his or her health status or claims history. In addition, AHPs generally require that the employer contribute some minimum specified percentage of the cost of single coverage in order to ensure against adverse selection of coverage.. That means participating employers can (and do) establish uniform employee contribution rates for their employees that are different than the employee contribution rates established by other employers, and these employee contribution rates do not necessarily bear any relation to the rate charged to each respective employer for AHP coverage. In other words, just because a particular employer participating in an AHP would be charged a higher rate in the aggregate than another unaffiliated employer does not mean that participating employer would necessarily require higher employee contributions for coverage of its employees than other participating employers require of their employees.

For example, it would not be unusual for an employer in an AHP whose cost of coverage is \$1.2X per covered person per month to require its employees to pay 10% of the cost as the employee contribution, while another employer participating in that AHP whose cost of coverage is \$.8X per covered person per month requires its employees to pay 25% of the cost of coverage. In that example, the employees of the first employer would pay **less** for coverage (\$.12X) than the employees of the second employer (\$.2X), even if the first employer was charged **more** for coverage. The point is that the amount charged to the **employees** for coverage under an AHP is not necessarily dependent on what each **employer** is charged for that coverage. Given that the purpose of Section 702 of ERISA is to protect the **employees** from an increased cost of coverage

due to their individual health status or claims history, the Department's proposed non-discrimination rules would do nothing to further that purpose.

The weakness of the Department's basis for imposing a non-discrimination requirement on AHPs is demonstrated even more clearly when compared to the treatment of a controlled group of corporations treated as a single employer under ERISA. Assume parent (P) and its wholly-owned subsidiary (S) purchase a group health insurance policy in the large group market from insurance company (C) covering all employees of P and S. C performs medical underwriting on P's and S's workforces and proposes to charge P and S \$1X per covered person per month for this group health insurance coverage. For internal cost allocation purposes, P and S request that C provide a breakdown of the specific cost of that coverage between P's workforce and S's workforce. C provides a breakdown showing that the cost of covering P's workforce is \$.9X per covered person, while the cost of covering S's workforce is \$1.1X per covered person. While P and S collectively will pay \$1X per covered person per month for coverage, P and S decide to allocate the cost of this premium between themselves in accordance with the breakdown provided by C (*i.e.*, P will bear the cost of \$.9X for each of its covered persons, while S will bear the cost of \$1.1X for each of its covered persons).

There is nothing in Section 702 of ERISA or its regulations that would prohibit P and S from allocating the cost of group health insurance coverage among themselves in the above manner, even though they are treated as a single employer under ERISA. Further, P and S would be permitted to charge their respective employees different amounts based on bona fide employment-based classifications in accordance with 29 CFR § 2590.702(d)(1). S would not, however, be permitted to charge an individual employee more for health coverage than P and S

otherwise charge their other employees simply because of that employee's health status, nor could S create some arbitrary classification of employees into which it would include one or more of its higher risk employees so as to increase the premiums higher risk employees are required to pay.

There is even less risk of discrimination against individual employees of separate, unaffiliated common law employers in an AHP than there is with respect to individual employees of members of a controlled group. In the above controlled group example, it is likely that any decision made by P and S about how much to charge employees for health coverage would be coordinated. While P and S could plausibly claim to be charging S employees more for coverage based on bona fide employment-based classifications (such as the fact that their employees work for separate legal entities or in separate geographic locations), there is significant potential that P and S could coordinate and decide to charge S employees more for coverage based on the health status of one or more of S's employees. By contrast, separate employers in an AHP are highly unlikely to coordinate among themselves how much they will charge their own employees for coverage, first because they do not know how much other employers in the AHP are being charged for coverage or are charging their employees and second because what other employers charge for coverage is generally irrelevant to a particular employer's decision as to what to charge its employees.

Because it is extremely unlikely that separate, unaffiliated employers participating in an AHP would act in concert to discriminate against targeted employees as to employee contribution rates (and without any proof that such practices actually occur), allowing insurance companies to separately experience rate employers participating in AHPs and allowing those separate employers to determine what to charge their employees for coverage poses very little risk of discrimination

against individual employees in premium or contribution rates. The Department should revise the Proposed Rule to reflect that reality and, rather than prohibiting insurers from experience rating separate small employers participating in an AHP, should consider clarifying that 29 CFR § 2590.702(d)(1) allows those insurers to charge each small employer a different premium amount and further allows each small employer to establish separate employee contribution rates for its employees.

Admittedly, this analysis assumes that sole proprietors, self-employed individuals and one life “groups” are not eligible to participate in AHPs.<sup>3</sup> As noted in the Comment Letter, AWB proposes that the prohibition against experience rating separate small employers in an AHP apply only to the extent the AHP agrees not to offer coverage to sole proprietors, self-employed individuals or employers with fewer than two employees.

2. Unless separate small employers can be experience rated, an AHP offering comprehensive health coverage is simply a less efficient version of the state’s small group community rating pool.

If the Department is interested in providing small employers the greatest number of additional options within the health insurance market, it needs to take steps to encourage AHPs to offer robust comprehensive benefit packages that have actuarial values at least equal to or greater than benefit packages offered in the small group market. That, in turn, means the Department must allow AHPs to experience rate each separate small employer member based on its aggregated claims experience. Otherwise, if an AHP that offers comprehensive coverage comparable to

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<sup>3</sup> Perhaps ironically, the Department’s proposed expansion of the definition of “employer” to include sole proprietors and self-employed individuals is what creates the possibility of prohibited discrimination against specific individuals where no such potential for discrimination currently exists.

coverage required to be offered in the small group market must underwrite its participating employers on a community-rated basis, that AHP is simply a smaller, less efficient version of the small group pool in its state, and it will be highly vulnerable to a death spiral.

As a practical matter, it would be impossible for a particular AHP to cover the entire small group population within that state. That means any AHP's risk pool will necessarily be smaller than the state's risk pool, which in turn means the rates for a particular AHP insurance product would almost certainly be higher than the rates for a comparable product in the small group market rates in that state. In that case, the only way an AHP could compete against insurance products in the small group market generally is by offering a large group policy with substantially reduced benefits that do not cover all categories of essential health benefits. Many associations currently do not offer, and do not want to offer, those types of reduced-benefit plans.

3. Employers participating in an AHP can have commonality of interest even if they are separately experience rated

In the preamble to the Proposed Rule, the Department suggests that allowing an AHP to experience rate separate small employers means those employers no longer have a commonality of interest sufficient to be treated as a single employer. In AWB's experience, that is not true.

There are a number of examples of AHPs, including AWB's, that are clearly member-managed and that also experience rate each participating employer. These are not entrepreneurial MEWAs, and they are not controlled by insurance companies.

As mentioned in the Comment Letter, employers in Washington have had a choice between two robust markets – the small group community-rated market and the AHP market – for more than two decades, and those dual markets have worked well side-by-side. In fact, it is not uncommon for an employer to participate in the AWB AHP (on an experience rated basis), cease participating in the AHP, and then later return to participate in the AHP on an experience rated basis. There are a number of reasons this could occur, not just due to fluctuations in the claims experience of that employer. In the case of AWB, many of its employers who cease participating in the AHP product continue to buy coverage in the small group market from the same insurance company (Premera) that issues coverage to the AHP. A not insubstantial number of those employers eventually return to the AHP product.

The AWB AHP is managed by a board of trustees elected by the members of AWB. Recognizing the fluidity of the small group and AHPs markets, pursuant to the terms of the AWB trust agreement, an individual representative of an employer who is an AWB member and who either currently purchases coverage through the AHP **or previously purchased** coverage through the AHP is eligible to serve as a trustee. As a result, the current trustees of the AWB AHP include representatives of employers who previously purchased the AHP product, but have since chosen to purchase coverage in the small group market. Those trustees who are not currently covered under the AHP product nonetheless provide valuable input as to the design of the Premera insurance coverage and the operation of the AHP. As members of discrete industry classifications whose health insurance needs are similar to the other employers in those industries, AWB trustees share a number of common bonds. The fact that the AWB trustees include both prior purchasers of health insurance coverage through the AHP and prospective purchasers of that coverage further

enhances the ability of the trustees to oversee the AHP. All of AWB's trustees, including those who do not currently purchase one of the AHP products are able to offer valuable insight into the design of the benefit plans to be offered AHP members, how the rates are to be negotiated with the insurance company, whether and to what extent to offer ancillary products (like vision and dental coverage) and the like. They understand there may be periods during which, for whatever reason (including their own experience rating) the AHP products are not the right choice for their business. That does not, however, disqualify them from being able to represent their fellow employers who may lack the time or interest to engage in this important oversight process. These factors demonstrate clear commonality of interest with the other AWB members in their respective industries.<sup>4</sup>

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<sup>4</sup> For the reasons explained in this Exhibit A, to the extent the Proposed Rule limits the members of an AHP's governing body to representatives of employers who currently purchase coverage through the AHP, AWB believes this restriction should be eliminated.