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Washington, D.C. 20004

Via www.regulations.gov
and U.S. First Class Mail

January 19, 2024

Hon. Julie A. Su, Acting Secretary of Labor
Attn: Proposed Rescission/AHP Final Rule/
RIN 1210-AC16
Dept. of Labor, EBSA/ORI
200 Constitution Ave. NW, Rm. N-5655
Washington, DC 20210

Dear Madam Acting Secretary:

RE: EBSA Notice Titled "Definition of 'Employer' -- Association Health Plans,"
RIN 1210-AC16, 88 *Fed. Reg.* 87968 (December 20, 2023)

This letter presents comments of the National Federation of Independent Business (NFIB)¹ on the Department of Labor Employee Benefits Security Administration (EBSA) notice of proposed rulemaking titled "Definition of 'Employer' -- Association Health Plans" and published in the *Federal Register* of December 20, 2023. In 2018, the Department issued a final rule on Association Health Plans (AHPs) that, as the Department then stated, facilitates "the adoption and administration of AHPs and expands access to affordable health coverage, especially for employees of small employers and certain self-employed individuals."² One U.S. District Court vacated portions of that rule,³ and the Government appealed the decision.⁴ Then President Biden took office. With the notice cited above, the Biden Administration proposes to rescind the 2018 AHP rule, showing continued hostility to the efforts of small businesses to help their employees obtain affordable, flexible, and predictable health benefits. Please withdraw the proposed rescission of the 2018 AHP rule, leave the rule in place, and defend the rule in court.

¹ NFIB is an incorporated nonprofit association representing small and independent businesses. NFIB protects and advances the ability of Americans to own, operate, and grow their businesses and ensures that the governments of the United States and the fifty States hear the voice of small business as they formulate public policies.

² 83 *Fed. Reg.* 28912 (June 21, 2018) (emphasis added).

³ *New York v. United States Department of Labor*, 363 F. Supp. 3d 109 (D.D.C. March 28, 2019).

⁴ Notice of Appeal (Doc. 80) in *New York v. United States Department of Labor*, No. 18-cv-1747 (D.D.C. filed April 26, 2019). See Status Report (Doc. 2033367), No. 19-5125 (D.C. Cir. filed December 27, 2023) ("After considering the issues, the Department has issued a notice of proposed rulemaking that proposes to rescind the rule at issue in this appeal.").

Small business owners often seek to assist or encourage their employees to obtain health insurance coverage for themselves and their families. Small business owners assess the cost of health insurance as one of the most severe business problems they face.⁵ According to a recent survey of small businesses with employees, 56% offer health insurance to those employees and 44% percent do not. The size of the organization matters; 89% of small businesses with thirty or more employees offer those employees health insurance, while only 39% of small businesses with fewer than ten employees do. Of the 44% of small businesses with employees that do not offer health insurance to those employees, 65% report that offering health insurance would be too expensive.⁶ Thus, NFIB has strongly supported moving toward a free market in health insurance that makes available affordable, flexible, and predictable health insurance coverage.

In the face of the often unwanted, cost-hiking mandates that the Obamacare statute⁷ imposed on the U.S. health insurance market, many small businesses have sought ways to assist their employees with health insurance coverage. Actions taken by the previous Administration gave small businesses four hopes for helping employees find affordable, flexible, and predictable coverage: short term limited duration health insurance (STLDI), level-funded plan arrangements, hospital indemnity or other fixed indemnity insurance, and association health plans. These mechanisms avoided the cost-hiking Obamacare mandates and potentially kept costs low enough that some small businesses could use them to assist their employees. But earlier this year, the Biden Administration proposed to kill the benefits to small businesses of STLDI, level-funded plan arrangements, and hospital indemnity or other fixed indemnity insurance.⁸ And now, with the proposed rescission of the 2018 AHP rule, the Biden Administration proposes to take away the potential for achieving affordable, flexible, and predictable health insurance coverage for small businesses through AHPs.⁹

⁵ NFIB Research Center, *Small Business Problems & Priorities* (2020), p. 4, available at [NFIB-Problems-and-Priorities-2020.pdf](#) (visited January 4, 2024).

⁶ See NFIB Research Center, *Small Business Health Insurance Survey* (March 2023) (“2023 Survey”), pages 2 and 4, available at <https://strgnfibcom.blob.core.windows.net/nfibcom/Health-insurance-survey-NFIB.pdf> (visited January 18, 2024).

⁷ Patient Protection and Affordable Care Act, Public Law 111-148 (March 23, 2010), as amended by the Health Care and Education Reconciliation Act of 2010, Public Law 111-152 (March 30, 2010).

⁸ See Notice of Proposed Rulemaking, Short-Term, Limited-Duration Insurance; Independent, Noncoordinated Excepted Benefits Coverage; Level-Funded Plan Arrangements; and Tax Treatment of Certain Accident and Health Insurance, Docket CMS-9904-P, 88 *Fed. Reg.* 44596 (July 12, 2023). See also the NFIB comment letter of September 6, 2023, filed in Docket CMS-9904-P.

⁹ Allowing small businesses to join together to form AHPs would help them participate in the health insurance market more effectively as they seek to negotiate rate reductions and coverage expansions with the aim of providing affordable and effective insurance options for their employees. A majority of small business owners believe the ability to offer health benefits to their employees would help them attract and retain the employees they need. See 2023 Survey, p. 5. And of the small businesses that currently offer health insurance to their employees, 98% are concerned that the cost of providing health insurance to their employees will become unsustainable in the next five to ten years. See 2023 Survey, p. 6. Please note that NFIB is not engaged in special pleading for the NFIB organization in asking to retain the 2018 AHP rule. NFIB could not establish an AHP under that rule because, among other reasons, business size (in this case “small”) is not a sufficient commonality of interest under the rule. See 29 CFR 2510.3-5(b)(5) and (c).

The Biden Administration should withdraw the proposed rescission of the 2018 AHP rule, leave the rule in place, and defend the rule in the U.S. Court of Appeals for the D.C. Circuit (Case No. 19-5125). It is difficult to understand why the Biden Administration consistently seeks to make it harder for small businesses to help their employees with health insurance coverage. The last thing those employees need is for the government to make it harder and more expensive for them to get health benefits.

Sincerely,



David S. Addington

Executive Vice President and General Counsel