March 6, 2018

The Honorable R. Alexander Acosta
Secretary, U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Mr. Preston Rutledge
Assistant Secretary, Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

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

Dear Secretary Acosta and Assistant Secretary Rutledge,

We, the undersigned organizations, write with strong objection to the proposed rule, Definition of "Employer" under Section 3(5) of ERISA – Association Health Plans (AHPs). The proposed rule would open the floodgates to greater fraud and insolvencies, putting consumers at risk of unpaid medical bills, and threaten the availability and affordability of comprehensive coverage for many small employers and individual consumers.

AHPs have a history of fraud and insolvency. Fraudulent AHPs targeted small employers and individuals, and then collected premiums for non-existent health insurance, did not pay medical claims, and left businesses, individuals, and providers with millions of dollars in unpaid bills and patients without health insurance coverage. Researchers found that between 2000 and 2002, 144 operations left over 200,000 policyholders with over $252 million in medical bills.[i] For consumers and patients, the results were disastrous: some victims were forced into bankruptcy; others have lifelong physical conditions as a result of delayed or foregone medical care.[ii] We are extremely concerned that the proposed regulation will once again leave consumers with insufficient coverage, unpaid medical bills, and lifelong health implications – just as AHPs did before the Affordable Care Act (ACA) provided more oversight and protection.

In the past, AHPs expanded by segmenting state health insurance markets. The proposed regulation would further this segmentation by creating an uneven playing field between AHPs and the individual and small-group markets. Because the rule would subject AHPs to substantially weaker standards than ACA-compliant plans, the plans could be structured and marketed to attract younger and healthier people, thus leaving older, sicker, and costlier risk pools behind. Consumers who need comprehensive coverage, including those with pre-existing conditions, and consumers with incomes too high to qualify for subsidies, would face rising premiums and potentially fewer plan choices.

As a result of this proposed rule, AHPs could substantially scale back their benefits, dropping benefits entirely or dramatically limiting them. Limiting plan benefits was a predatory practice that existed before the ACA as a way to discourage anyone with a pre-existing health condition or high expected health care utilization from enrolling in coverage.

While the proposed rule prevents health status rating of separate employers, the rule appears to allow groups or associations to base premium rates on any other factor, including gender, age without limit, industry and other factors actuaries create to estimate health care utilization. Small businesses with a workforce that is older, disproportionately women, or in industries that are believed to attract high health care utilizers would suffer the most.

We are pleased that the proposed rule applies the HIPAA nondiscrimination provisions to AHPs. While this is an important provision of the proposed regulation and must be retained in the final rule, it does not go far enough to prevent cherry picking healthier employers or premium rating that approximates health status rating. In order to more meaningfully prevent discrimination, the Department should apply EHB, rate reforms, guaranteed issue and single-risk pool requirements. The single-risk pool requirement is an important way to ensure that AHPs, where they exist, do not result in a segmented market.

We reiterate our strong objection to the proposed rule, which may lower costs and provide more choices for some small employers, but increase cost and limit choices for all other small employers with workers in less-than-perfect health.

Sincerely,

American College of Obstetricians and Gynecologists
American College of Physicians
American Muslim Health Professionals
Association for Community Affiliated Plans
Association of Reproductive Health Professionals
Autism Speaks
Autistic Self Advocacy Network
Center for Public Policy Priorities
Children's Defense Fund - Texas
Coastal Bend Center for Independent Living
Colorado Children's Campaign
Colorado Consumer Health Initiative
Community Catalyst
Consumers for Quality Care
Easterseals Central Texas
Families USA
Health Action New Mexico
HealthyWomen
Hypertrophic Cardiomyopathy Association

Justice in Aging
Lupus Foundation of America
Mental Health Colorado
NASW-TX
National Asian Pacific American Women's Forum (NAPAWF)
National Association of Social Workers
National Consumers League
National Education Association
National Institute for Reproductive Health (NIRH)
National Latina Institute for Reproductive Health
National Partnership for Women & Families
National Women's Law Center
Out2Enroll
Physicians for Reproductive Health
Planned Parenthood Federation of America
San Francisco AIDS Foundation
South Carolina Appleseed Legal Justice Center
Stahlman Disability Consulting, LLC
The AIDS Institute
The Sargent Shriver National Center on Poverty Law
Together Colorado
Universal Health Care Action Network of Ohio
Utah Health Policy Project
West Virginians for Affordable Health Care
Young Invincibles

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i Kofman, M. (2005). *Association Health Plans: Loss of State Oversight Means Regulatory Vacuum and More Fraud*. Georgetown University Health Policy Institute. Retrieved 8 February 2017, from https://hpi.georgetown.edu/ahp.html

ii Kofman, M. (2005). *Association Health Plans: Loss of State Oversight Means Regulatory Vacuum and More Fraud*. Georgetown University Health Policy Institute. Retrieved 8 February 2017, from https://hpi.georgetown.edu/ahp.html