March 6, 2018

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

RE: RIN 1210-AB85

Submitted electronically via www.regulations.gov

Dear Secretary Acosta:

I am writing on behalf of the National Association of Health Underwriters (NAHU), a professional association representing more than 100,000 licensed health insurance agents, brokers, general agents, consultants and employee benefits specialists. We are pleased to have the opportunity to provide comments in response to the proposed rule published in the Federal Register on January 5, 2018, titled "Definition of 'Employer' under Section 3(5) of ERISA – Association Health Plans."

The members of NAHU work on a daily basis to help millions of individuals and employers of all sizes purchase, administer and utilize health insurance coverage. Our expertise lies in the technicalities of health-plan purchasing and administration and the real-world challenges employers face therein. NAHU members are exceptionally well-versed on all of the coverage options that small and large businesses, as well as individual consumers and sole proprietors, have available to them in every geographic area of every state. Our agents and brokers are also experts on the prices associated with all of these coverage choices and the means of group health plan cost-containment that are available to businesses of all sizes and structures. NAHU members have in-depth knowledge of the practical aspects of state-level employer health insurance markets, including best practices on a pragmatic and technical level when it comes to health plan administration, structure and regulation. We are glad to share this expertise with the Department as it applies to the proposed rule. A representative group of brokers that works exclusively in the markets most likely to be affected by the proposed rule (individual, sole proprietors, small-group and existing association health plan consumers) have contributed their insight about how this new approach will impact the markets they serve. We have grouped our comments on the proposed letter by topic, as requested, and appreciate your consideration of our point of view.

Overview
NAHU appreciates the intent of President Trump's Executive Order 13813, "Promoting Health Care Choice and Competition across the United States." We also understand the Department's approach with this proposed rule to allow more multiple employer welfare arrangements (MEWAs) or association

health plans (AHPs) to be treated under state and federal laws as a single group health plan rather than a collection of small group plans with a joint administrator. Every day, NAHU members work with sole proprietors, startup companies and small-business owners struggling in their quest to find affordable health insurance options for themselves and their employees, so our association certainly understands the need to help this population. We see how, in some circumstances, the expanded AHPs as proposed might provide coverage options that are simpler to entities that are more focused on business growth and job creation than on the logistics of medical plan coverage. Additionally, AHPs that are targeted by industry and/or geographic area, if structured correctly, could provide cost savings and increased benefits that are very specific to the needs and desires of their membership. For example, an industry-specific organization might be able to tailor its medical benefits or wellness program offerings in ways that would be very appealing to the members of the specific profession. Similarly, a geographically zoned organization could attempt to design a plan with very meaningful and clear price transparency and medical care-quality tools and incentives for its beneficiaries that were very specific to the targeted population center.

However, NAHU would be remiss if we didn't point out that while benefits and some cost savings may be created for specific populations, the cost benefits for many small employers are likely to be small, if there are any at all. Many of the cost savings associated with large-group health insurance coverage come with the economies of scale of dealing with a single plan sponsor. While the changes proposed to the Department's traditional approach to ERISA Section 3(5) may give AHPs access to the simplified regulatory structure and increased number of plan options provided by the large-group market federally and in most states, they cannot amend the composition of AHPs still being many small entities. Each business member of the AHP will have unique service requirements, and both the human capital and actual costs of tending to many small companies will be higher than those associated with a true single business entity. Furthermore, even if an AHP attracts a considerable number of participants, its size and bargaining power is unlikely to supersede the scope of even a smaller private health insurer's pool of participating small employers. Therefore, costs for many smaller companies' health insurance will be similar or even slightly more expensive than if coverage is purchased through a traditional small group plan. These entities may find the increased benefits AHPs could offer so attractive that any extra costs would be worthwhile but, based on our membership's longstanding observations of the health insurance purchasing behaviors of small employers, we do not believe there will be an overwhelming response by the small-business community to transition from the traditional small-group market to AHPs.

More simply put, as with all things, there will be some entities that benefit more than others with any new health insurance purchasing approach, including expansion of AHPs. Two critical points that NAHU urges the Trump Administration to keep in mind as it moves forward with implementation of Executive Order 13813 and any resulting regulations are: (1) the unique and extensive health insurance service needs of small employers, and (2) the need for a comprehensive national effort to reduce and contain medical care service costs that affect every health coverage program and insurance marketplace

nationwide. Health insurance agents and brokers are serving millions of small employers with their healthcare purchasing and year-round customer-service issues, and many NAHU members are interested in providing similar services to AHP participants if this market expands. NAHU urges the Trump Administration to be cognizant of the assistance and professional advice business owners require when it comes to their health coverage, and to allow for meaningful participation and fair compensation of health insurance agents and brokers in any expanded AHP marketplace. Additionally, we call on the Trump Administration to not limit its efforts to reduce healthcare-purchasing costs and growing market options for small businesses and sole proprietors to just AHPs and the other ideas addressed in Executive Order 13813. Unless federal policymakers concentrate efforts on lowering the costs of medical care and prescription drugs directly, as well as increasing medical care price and quality transparency for consumers, market competition and cost issues will remain.

Part A – Allowing Employers to Band Together for the Single Purpose of Obtaining Health Coverage

In Part A of the proposed rule, the Department addresses how it plans to expand on the existing regulatory guidance regarding employers with a common interest that may join together to purchase health insurance coverage. The Department proposes the use of either a common trade/industry/profession standard or a common geographic standard, to include metropolitan areas that may extend over the boundaries of multiple states or other jurisdictions. Comments were requested as to whether these two standards would be sufficient to accommodate diverse groups of employers that might have a common interest. NAHU believes that these two types of groupings are enough to test the concept of expanded AHPs.

Concerning the two types of grouping proposed, NAHU members feel that it is crucial in any final rule that the Department provide clear and specific definitions of what will constitute a common trade, industry or profession and what a common metropolitan area might be. NAHU believes that some AHPs may attempt to adversely select against specific groups in violation of the spirit of nondiscrimination protections outlined in Part D of this proposal unless clear parameters define common industry. We also believe definitions concerning membership criteria will help state and federal regulators, as well as independent consumers, detect potential sham operators, which, unfortunately, have been a historic concern in the AHP market space.

Similarly, NAHU believes that, in the final rule, the Department must clearly define what will be considered acceptable common geographic areas, particularly with metropolitan areas that may extend across multiple regulatory jurisdictions. Individual states and counties would be logical identifiers. As for multi-state regions, perhaps a simple map approach, with boundaries that could be updated by the Department at regular intervals, would be best. NAHU believes that no matter what method the Department decides to use, the most critical thing is that the Department takes a clear and decisive

approach to define boundaries within this category. It will be crucial to market stability, consumer protection and fraud prevention.

NAHU supports the creation of a formal association health plan approval process to be carried out by federal regulators to ensure that all trade and industry and/or geographic common interest standards are met. Valid associations should be required to make their federal AHP certification visible to all potential employer members and individual consumers as a means of fraud prevention. We also believe that the final rule should specify that all AHPs are required to obtain any licenses or certifications that may be required by individual state regulators, and NAHU would support the creation of reasonable state licensing or certification requirements for AHPs.

Part B – The Group or Association Must Have an Organizational Structure and Be Functionally Controlled by Its Employer Members

NAHU believes that, in any final regulations, the Department needs to include firm guidelines for the framework of new and existing associations concerning AHPs. NAHU understands the Department's logic of using the existing association structure outlined in sub-regulatory guidance to define acceptable association frameworks, but we are concerned the current standards may not appropriately accommodate the expanded scope of associations and any newly formed associations that the finalization of this rule will likely bring.

NAHU has apprehension about the logistics of bylaws drafting for newly formed associations and the potential for hidden language about fees, length of membership terms and other elements that may not be beneficial to consumers and could ultimately cause harm to the associations and their members. Additionally, we believe it is crucial that AHPs have a structure in place to support all members through all of their various health coverage needs. Their issues will include everything from ensuring sufficient provider network adequacy for associations with members in far-ranging states to maintaining appropriate service support for all members nationwide.

NAHU is also concerned that this section of the proposed rule and the related preamble language does not address how the Department plans to prevent fraud through the use of typical organizational structure requirements, like requiring AHP licensing or some type of certification, as well as bonding and verification that the association will be financially sound through reserve requirements. There is a long history of consumer harm and fraud in the AHP market, which has cost small employers and their employees hundreds of millions of dollars in unpaid claims and excessive administrative costs. These cases stretch back decades but still occur today, with several high-profile cases involving millions in damages addressed by courts and state and federal regulators in New Jersey, Florida and Washington just in this past year. NAHU urges the Department to address fraud prevention in the final rule.

Finally, NAHU believes that any final rule will need to spell out how AHPs will handle all related compliance concerns for the group health plan. As a single large-group plan, we assume that the AHPs will have liability for complying with all federal and state laws and regulations that apply to group health plan sponsors. Our membership requests that the final rule explicitly outline the range of the association's liability and responsibilities and how it may legally handle compliance issues. Some of the duties we would like specifically addressed include who will be responsible for ERISA plan requirements and fiduciary rules, IRC 4980(h) and the related IRC 6055 and 6056 reporting requirements, W-2 reporting, COBRA compliance, 5500 filings and all of the other responsibilities that come with the maintenance of a single large employer plan. We also note that many existing regulations concerning group health plan compliance with existing statutory requirements may need to be amended to address expanded AHPs.

Part C – Group of Association Plan Coverage Must Be Limited to Employees or Employer Members and Treatment of Working Owners

NAHU acknowledges that sole proprietors currently lack affordable coverage options in many states and would benefit from market relief. However, our membership believes that it is critical that any final change to AHP regulations that allows for the inclusion of working owners or other sole proprietors feature a reliable standard to ensure that such participants genuinely are the owners of small businesses. The proposed rule includes a requirement that working owners meet minimum weekly or monthly hour requirements or have earned business income that meets or exceeds the cost of coverage. While the Internal Revenue Service could eventually verify business income, it would be impossible for AHPs to track the income of potential members prospectively and there would be no way to check hours worked accurately. As such, the proposal would allow employer owners to attest that they meet the proposed standards.

NAHU has concerns that the attestation standard proposed would be insufficient to prevent potential fraud. Instead, our membership suggests that the Department look to existing state standards regarding the coverage of sole proprietors in the small-group marketplace. The state of Maryland has utilized a successful open-enrollment period for sole proprietors for decades, in order to curb adverse selection. Additionally, many other states, including Delaware, allow sole proprietors to participate in their small-group markets and require appropriate documentation to confirm business-ownership status, including the submission of a current Schedule C, the tax document submitted for sole proprietors, as well as a current state or local business license. For startup businesses, a history of paid invoices could be used to verify authenticity.

NAHU feels strongly about the definition of working owners or sole proprietors because those sole proprietors that own their own businesses and are truly groups of one belong in the small-group market and are a different type of insurable risk than those that may be sole proprietors that work several jobs but are not considered a group of one and are better categorized as being part of the individual market when it comes to risk assessment. These differences are evidenced in studies from the American

Academy of Actuaries, which reflect the different risk aversion of these two distinct yet sometimes similarly defined entities. Allowing those who may be self-employed but not truly sole proprietors to participate in AHPs would lead to mixing of the small-group and individual market. As the individual market struggles, mixing in that risk with the small- and large-group markets through AHPs will only serve to drive up costs to all members in the AHP, and will not serve the purpose of this proposed rule.

The proposed rule also would prohibit working owners from participation if they had a valid offer of other group coverage. NAHU opposes this means of screening because we believe that it is unenforceable and would be an unneeded complication for AHPs. While some offers of coverage are reported under IRC 6056, AHPs could not use that information to prospectively screen individuals. Also, only group coverage offers from applicable large employers are reported so it would be impossible to verify any offer of other coverage through a small employer. Finally, we do not believe this requirement is an effective means of market protection, nor would it ensure that all AHP entrants were legitimate business owners.

Part D – Health Nondiscrimination Protections

In Part D of the proposed rule, the Department aims to extend HIPAA and ACA nondiscrimination and guaranteed-participation requirements and protections to the individual working owners and businesses that might make up the participant pool of an AHP created under the new regulatory structure. The proposed rule would require the AHP to treat each business entity the same regarding the issuance of coverage and premium contribution rates. The Department asked for comments about whether the extension of these protections will provide adequately for market and AHP stability. NAHU believes that extending nondiscrimination protections to AHP participants in the proposed manner would help shield against initial adverse selection and discrimination against specific business entities. However, we question the long-term impact of this type of plan. Compared to the traditional small-group market, the risk spreading among the members of any AHP group will be slight. While the proposed methodology will allow for reasonable premium rate setting initially, the poor claims experience of even a single group member could cause rates to spike over time for all association members. When that happens, there is nothing in place that will prevent working owners and other small businesses who believe their personal claims experience to be good from leaving the AHP for another coverage option. If that happens, we suggest the Department propose stop-gap methods to prevent the further escalation of premium rates for the remaining groups.

Additionally, we would like the Department to address how other potential discriminatory or coercive actions by an AHP would be treated. For example, could an association charge higher membership or additional fees unrelated to premiums to individual business entities? Could the association require membership terms to last a certain length of time that extended beyond the typical one-year duration of a health insurance contract? What if a business entity wanted to leave the association before the end of a health plan contract year? Could penalties be imposed or other sanctions? NAHU requests that, in any final rule, the Department address allowable entry and exit ramps for individual business entity participation, as well as its prevention strategy related to discrimination and/or coerced participation.

Finally, NAHU has concerns about how these proposed nondiscrimination rules would impact existing AHPs. Currently in many states the presence of AHPs as a viable coverage option for small employers is limited or nonexistent, largely due to state laws that make the AHPs difficult to form and operate. However, in many other geographic areas, including much of the Midwest, fully insured AHPs already have a sizeable market presence due to a favorable state regulatory environment. One of the reasons why these AHPs are generally able to offer market stability and extra health plan services to their enrollees is that state laws allow them to offer different premium rates for plan participation on an employer-by-employer level. The factors different states allow existing AHPs to use to differentiate employer premium rate structures can include location, industry code, plan coverage options selected, the age of employees and the businesses overall medical risk based on historical claims data obtained through health insurance carriers. States regulate how much and how often an operating AHP can vary the premium rates charged to the individual employer group members, but that ability to risk-rate group participants is what makes AHP coverage an affordable option in these states currently.

The current proposed rule is geared at new AHPs but would appear to apply to existing AHPs as well. NAHU has significant concerns about the impact the new proposed nondiscrimination rules would have on existing plan costs for current AHP participants. By forcing all of these existing plan options to cease their existing business practice of varying participation costs on an employer-by-employer basis and instead require all employers participating in an AHP to pay the exact same amount per participating employee on an immediate basis, the new rule would force existing AHPs to raise their rates dramatically. NAHU members who currently work in this market space predict that tens of thousands of currently participating employers could see rate increases ranging from 50% to 125%.

While NAHU understands the Trump Administration's desire to expand the AHP marketplace, we do not believe it was the Department's intention to do so at the expense of existing and successful AHPs. As such, we request that any final rule include either a grandfather clause for existing fully insured AHPs regarding the non-discrimination rule, or allow for states to seek a waiver from the non-discrimination rules to protect their existing AHP marketplaces.

Other Comments

Beyond the direct provisions of the proposed rule, the Department has requested comments from interested parties on a wide range of related issues, and NAHU members have the following thoughts on these designated topics:

State and Federal Regulatory Authority

NAHU feels that existing state authority to regulate health insurance products sold within their boundaries, as established by Section 27 of the Public Health Services Act, is critical and should be preserved and unaffected by any new AHP regulation. As such, we request that any final regulation

clearly specify that it does not affect or attempt to modify Section 2762 of the Public Health Service Act. To further ensure consumers with the protections that state regulatory authority offers, we also believe the final regulation should specify that the Department not believe that the requirements set forth in Section 27 of the PHSA are inconsistent with the terms of ERISA.

NAHU believes that for effective consumer protection, each association should be required to have a local presence in a specific state or the District of Columbia beyond just a mailing address so that each AHP will have a definite state of situs and primary regulatory jurisdiction. Additionally, we believe that, in any final rule, the Department should provide detailed guidance about how different state regulators and the federal government will interface concerning regulation and consumer protection so that clear lines of authority and consumer support are evident from the beginning. Clear lines of authority will be crucial for individual consumers and AHP member employers, as well as for the establishment and effective regulation of AHPs themselves.

Notice Requirements

The Department solicited comments about potential notice requirements for AHP business consumers and individual beneficiaries. NAHU believes that AHP consumers both at the business level and individual participant levels need to have a clear understanding of what association membership signifies and how it may differ from traditional fully insured coverage. To serve this need, we propose the development of an AHP-specific addendum to the Summary of Benefits and Coverage (SBC) notice currently required to be distributed by all insurance carriers and group health plan sponsors, as well as related updates to the accompanying Uniform Glossary. NAHU believes that the SBC template should be adapted to address unique AHP issues, including any additional and unique benefits, costs and fees, claims-processing and service concerns, and association membership requirements that may affect both employer association members and their participating employees and dependents.

Additionally, NAHU proposes that the Department ask the National Association of Insurance Commissioner's statutory working group on Summaries of Benefits and Coverage to draft proposed AHP-specific amendments to the SBC and Uniform Glossary. This working group includes state insurance commissioners, health insurance industry representatives, consumer advocates, medical providers and health insurance agents and broker representatives. The working group was able to craft the original SBC template and the 2017 plan year revision that currently serves health insurance consumers in all markets. NAHU believes a reconstituted version of this group could efficiently identify the consumer awareness needs of potential AHP consumers. Finally, NAHU believes, for consumer-protection purposes, that all notice templates should be approved and in use before new AHPs may be marketed.

Additional Regulation Addressing Self-Funded MEWAs and State Regulatory Authority

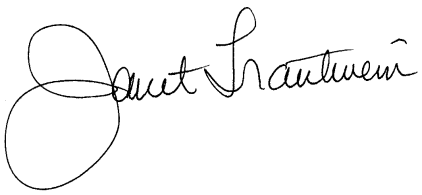
The proposed rule asks for comments about whether the Department should attempt, through additional regulatory action, to extend at least some of the intent of this regulatory proposal to self-funded MEWAs,

which are currently subject to greater state-level regulation and the subject of the 1983 amendment of ERISA. NAHU does not support any additional regulatory action by the Department in this area at this time. However, we would appreciate clarification in the final rule how the Department views the status of professional employer organizations (PEOs) as they relate to the change in the definition of employer.

Other Ways the Departments Can Support Existing and New Associations Looking to Form AHPs
The preamble to the regulation also requested insight as to ways in which the Department could support new and existing associations attempting to create AHPs. As we noted in our comments on Part B of this proposed rule, NAHU believes that both new and existing groups of employers that are looking to form association health plans will need organizational support. To make sure that their related bylaws and structures are sufficient to protect the needs of the underlying organization, the resulting health plan, and the individual employer members and their employees, NAHU urges the Department to consider additional regulatory action subject to public comment detailing proposed organizational structure guidelines. Furthermore, NAHU members believe that both new and existing associations will need access to local service providers and advisors to support the health insurance customer service needs of their members. We urge additional regulatory guidance to provide a clear path for such organizations to contract with health insurance agents and brokers for this purpose, and to allow for the fair compensation of licensed health insurance producers working with AHPs on their year-round needs.

NAHU sincerely appreciates the opportunity to provide comments on the proposed rule, and we look forward to working with you in the year ahead. If you have any questions or need additional information, please do not hesitate to contact me at either (202) 595-0787 or jtrautwein@nahu.org.

Sincerely,



Janet Stokes Trautwein
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