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Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655, U.S. Department of Labor
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The American Society of Association Executives (ASAE) is a non-profit professional society representing over 39,000 individuals who serve in membership associations in every state in the Union. Our members work to advance our country and our world by improving the industries and professions they represent through advocacy, training, knowledge sharing and certification. There is an organization for every industry and profession in the United States. Over 63,000 are organized under IRS Code section 501(c)(6) as trade associations and business leagues, and thousands of others are organized under IRS Section 501(c)(3) as education, research and other professional societies. To avoid confusion, we refer to these types of entities as “membership organizations.”

We applaud the Department’s efforts to allow associations of all types to provide health insurance to members through Association Health Plans (AHPs). In fact, ASAE has advocated for AHPs for many years. The membership organizations we represent are uniquely suited to provide benefits to their respective members, since they understand the unique needs that drive their industries, factors that are not taken into account in the individual or SHOP exchanges.

In particular, small businesses that constitute the backbone of our national workforce face ever-increasing health insurance, if they can even afford to offer it at all. By forming AHPs, membership organizations will allow businesses to aggregate workforces and take advantage of the flexibility and lower costs that are currently available only to large employers. Small businesses could thus offer more competitive benefits, allowing them to compete with large employers and international competitors to retain and recruit employees, and expend more of their limited managerial resources on the important business of running their businesses.

Some commentators claim that allowing AHPs would flood the market with cheap, thinly funded plans that offer minimal benefits. We strongly disagree. We believe that legitimate membership organizations will not risk their goodwill and reputation with their members by offering substandard insurance plans, particularly to provide benefits that are not valued by the talented employees that they represent. Instead, the economies of scale that an AHP could produce would allow the association to offer more comprehensive coverage than members could afford on their own, implement realistic risk pooling, and minimize compliance cost. However, we do believe that there is some risk in allowing AHPs to be offered by newly formed organizations whose participating employers do not share a common interest or nexus through tailoring eligibility requirements in order to improperly discriminate, resulting in adverse selection and, in extreme cases, an actuarial death spiral.

We acknowledge that these issues are quite complex, and we appreciate the opportunity to provide comments that may clarify and strengthen some areas of the proposed rule.

1. The definition of an “association” in the proposal should not be limited to those organizations who have employers as members.

The proposed regulations assume that the members of an association are employers. However, according to ASAE’s research, more than half of associations have individual members. Examples include the American Bar Association, the American Society of Civil Engineers, and the Society for Human Resource Management, among many others. The proposed regulation should be clarified to allow the employers of association members to join the AHP offered by that association. This could be accomplished by stating that an AHP may be offered by any non-profit membership organization that has been granted an exemption from taxation pursuant to IRS Code Sections 501(c)(6) or 501(c)(3). Alternatively, the proposed regulation could allow employee-members of the organization to join of their own accord, regardless of employment formalities. Further, the regulations should state that the membership organization may form a subsidiary for the purposes of offering the plan.

2. Preemption of state health insurance laws and regulations must be clearly stated in the proposed rule.

The viability of an AHP will be severely constrained if the AHP must comply with the myriad of differing regulations in each state. While an AHP within a single jurisdiction might be successful, most industries and professions cross many state lines. To serve its members, the AHP would then have to offer several different plans, at different costs and with escalating compliance requirements. It might thus be more difficult for an AHP to achieve the economies of scale needed to thrive.

In addition, in order to enjoy the same advantages that a large employer has with a self-funded plan, the AHP should be considered the “employer” for the purposes of offering the health insurance, and should not be characterized as a MEWA. We acknowledge though, that it is critical for the success of an AHP that the AHP is adequately capitalized and that it maintain sufficient reserves. It may make sense to allow the home state of the AHP to reasonably regulate the AHP’s capitalization and reserve requirements. We believe that this level of single state control plus clear state preemption will provide the effective and predictable regulatory environment to allow AHPs to thrive.

As discussed in the attached memorandum, we believe that the Department of Labor has sufficient authority to design and implement a regulatory structure that will allow states to exercise their traditional consumer-protection roles without unduly frustrating ERISA’s purpose of promoting employee benefits by implementing uniform interstate standards of conduct¹ and this administration’s desire to minimize “governmental imposition of private expenditures required to comply with Federal regulations.”²

3. There should be additional restrictions on the formation of AHPs that do not have a membership nexus to an existing association.

¹ S. Rep. No. 117 (1993)

² Executive Order 13771 (Jan. 30, 2017).

Much of the skepticism directed against AHPs stem from historical instances of bad actors offering thinly capitalized plans that collected premiums, but disappeared when claims came due. While the proposed regulations recommend some measures that may help prevent such fraudulent activity by a newly formed AHP, we are concerned that allowing anyone to form an AHP without a clear connection to an existing membership association could lead to the abuses of the past. Conversely, some of the proposed limitations will have the collateral effect of making well-intentioned AHPs less secure.

Existing membership associations have long-established relationships with their members, and are effectively controlled by their members. Associations offer benefits to their industries and professions and to our society beyond health insurance. An association would not risk its reputation and goodwill, and potentially its survival, by offering a thinly capitalized or substandard health plan. Without this nexus, a start-up AHP might not be as careful to ensure the success of the plan. We recommend that a legitimate, established association could be defined as an organization with the following attributes:

- Non-profit corporation with a federal tax exemption
- Established and operating for more than 5 years
- Average revenue or expenses of \$5 million over the last 5 years
- Substantial activities or programs other than the AHP
- Members that confirm membership at least annually, and who share a common industry, profession, field or demographic
- Members that have significant voting or participation rights, or whose interests are protected by other legal duties arising under state or federal law.

In addition, we suggest that any individual charged with the operation or management of an AHP be considered a fiduciary under ERISA. It is critical that those responsible for the AHP understand that they are obligated to protect the interests of the participants in the plan, and that they may be individually liable for the failure to carry out their fiduciary obligations.

We have attached a memorandum prepared with the assistance of the Pillsbury Winthrop Shaw Pittman LLP law firm which addresses some additional technical issues under the proposed regulations, as well as proposes legal mechanisms by which the above recommendations can be implemented.

Associations exist to improve the industries and professions that they serve; many have done so successfully for over a century; they can be counted on to do right by their constituents, perhaps in ways that have not been anticipated by policymakers. Again, we welcome the Department's proposed regulations since we believe that AHPs can help provide better benefits at lower costs, especially for small employers who have fewer choices every plan year. We appreciate this opportunity to comment, and are willing to assist in this effort in any way we can.