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Robert Wood Johnson Foundation

Office of the President and CEO

March 3, 2018

The Honorable R. Alexander Acosta
Secretary
U.S. Department of Labor
Office of Regulations and Interpretations
Employee Benefits Security Administration
200 Constitution Avenue, N.W.
Room 5655
Washington, D.C. 20210

Dear Mr. Secretary:

The Robert Wood Johnson Foundation (RWJF) appreciates the opportunity to provide comments on the recent proposed rule regarding the definition of "Employer" under Section 3(5) of the Employee Retirement Income Security Act (ERISA) as it relates to association health plans. RWJF is the nation's largest philanthropy dedicated to improving health and health care in the United States. Since 1972, we have worked with public and private sector partners to advance the science of disease prevention and health promotion; train the next generation of health leaders; and support the development and implementation of policies and programs to foster better health across the country, including high-quality health care coverage for all. Over the last several years, we have embarked on a journey to build a Culture of Health—enabling everyone in America to have a just and fair opportunity to live the healthiest life possible. Access to comprehensive, quality health care for Americans is central to our vision of good health and well-being. Accordingly, health care coverage expansion is critical to our mission and an essential component of the Foundation's work for more than four decades.

This proposed rule could significantly impact the individual and small group health insurance markets, by permitting the segmentation of healthier individuals and groups into lower cost plans, which could increase costs and reduce access to coverage options for those left behind. Further, association health plans have a troubled financial history, replete with many examples of insolvency and fraud.[1] Given the Foundation's commitment to the expansion of coverage, our comments and suggestions are motivated by a desire to minimize the adverse selection and financial instability that could result from this rule.

We would like to first commend you for proposing to include the anti-discrimination provision, which in our view is very important, since it would prevent an association plan from excluding or differentially pricing plans for higher risk employers or self-employed individuals. As the association plan strategy allows small employers to emulate larger employers, it stands to reason that they should also behave as large employers and offer coverage which is "guaranteed issue" to their employee population and doesn't discriminate among member employers. Further, if this provision were not in effect, employers with higher-risk employees would likely find association coverage less affordable, resulting in a small-group market with a sicker risk pool and higher premiums. More generally, if the goal of the rule is to create more parity between small and large group markets, we additionally recommend that association health plans should not be permitted to rate members on gender. Along the same lines, it would also be important to preserve parity with the individual and small group market with respect to age rating and benefit design. In other words, there should be no age rating in association health plans that exceeds 3:1, and association health plans and other plans in the small group and individual market should cover the same set of benefits. Maintaining these standards would be consistent with the current federal approach[2] to association plans.

We agree with the preamble statements affirming that states should retain their authority to fully regulate association health plans. This authority includes all aspects of state regulation, including solvency, market conduct, rates and forms, licensing, minimum coverage requirements, network adequacy, and marketing standards. Insolvent plans will have their greatest impact at the local level, and cause distress for local business owners, employees, and health care providers. States may differ in their standards and requirements, and states should be permitted to add enhanced consumer protections for their residents. State regulators have long been concerned about the potential problems posed by association health plans. Maintaining broad state authority is critical to preventing fraud and other poor outcomes, and we are concerned that seeking ERISA exemptions from state authority will pose greater potential risks than benefits to consumers.

We concur that it is very important to utilize strict criteria to define credible self-employment in the individual market. Since about one third of individual market enrollees are self-employed, the impact of association health plans in the individual market could be considerable.[3] The proposed definition suggests that enrollees in the individual market must be truly self-employed to participate in an association plan, and cannot qualify on the basis of very part time or episodic work. Maintaining these high standards will prevent the individual market from unravelling into a myriad of sham association plans. It is critical that the final rule outlines a credible enforcement mechanism for verifying the "genuine employment-based relationship", which should probably be based on tax returns. We recommend that an enforceable standard be created to verify self-employment status. States, if they wish, should be permitted to exceed these federal requirements.

We recommend that it be acknowledged that there are those who might be worse off as a result of this rule, and that there is some consideration of how to mitigate that effect. There will be small businesses that will not have the opportunity to join association health plans, either because of their industry, geography, or employee demographics. These groups will likely face increased premiums. Similarly, most enrollees in the individual market will not be able to take advantage of association health plans, since they are not sole proprietors. Those remaining in the

market will have no other recourse for insurance and will see their premiums rise due to adverse selection. This situation might be heightened in places where there are many self-employed people, such as farm states, or if the "employment" clause were not diligently enforced.

We have two recommendations related to this point:

1. States should be able to assess the impact of association health plans on premiums, and then impose a tax[4] on these plans that would be used to at least partially offset the problem caused by adverse selection.

2. The remaining transitional plans in the individual and small group market should be eliminated. The expansion of association health plans presents an opportunity for more segmentation in the individual market, which will result in higher premiums for those left behind. Transitional plans are a pre-existing form of segmentation which currently have major impacts[5] in some states. We suggest that this would be an opportune time to eliminate these remaining transitional plans, so as to minimize the negative impacts of association health plans on the individual and small group markets.

We appreciate the opportunity to comment and look forward to working with the Department of Labor and others to expand coverage opportunities.

Sincerely,

Richard Besser, MD
President & CEO

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[1] America's Health Insurance Plans. Association Health Plans Issue Brief. October 2017. *www.ahip.org/wp-content/uploads/2017/10/Association_Health_Plans_10-6-2017.pdf*

[2] The Commonwealth Fund. President Trump's Executive Order: Can Association Health Plans Accomplish What Congress Could Not? October 2017. *www.commonwealthfund.org/publications/blog/2017/oct/association-health-plans-executive-order*

[3] Hamel, L., Firth, J., Levitt, L. et al. The Henry J. Kaiser Family Foundation. Survey of Non-Group Health Insurance Enrollees, Wave 3. May 2016. *www.kff.org/health-reform/poll-finding/survey-of-non-group-health-insurance-enrollees-wave-3/*

[4] Reducing The Externalities Caused By Limited Benefit Plans, Health Affairs Blog, October 5, 2017. DOI: 10.1377/hblog20171021.343210 *www.healthaffairs.org/do/10.1377/hblog20171021.343210/full/*

[5] Robert Wood Johnson Foundation Collection. Health Reform: By The Numbers. August 2017. Marketplace Pulse: Leaky Risk Pools Sink Markets. *www.rwjf.org/en/library/research/2017/08/marketplace-pulse--leaky-risk-pools-sink-markets.html*