

March 5, 2018

Mr. Joe Canary, Director  
Office of Regulations and Interpretations  
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 Mr. Canary:

The American Retirement Association (“ARA”) is writing to provide comments with respect to the Notice of Proposed Rulemaking<sup>1</sup> (“Proposal”) to redefine the term “employer” for purposes of sponsoring an “employee benefit plan” under ERISA in the context of an Association Health Plan (“AHP”). We believe the Proposal would be a positive development in lowering the cost of health insurance, particularly for small employers. As a professional society, ARA is considering sponsoring an AHP for the benefit of our members. We believe AHPs will be very popular once the Proposal is finalized.

ARA is a national organization of more than 25,000 members who provide advisory, consulting, and administrative services to American workers, savers and sponsors of retirement plans and IRAs. ARA members are a diverse group of retirement plan professionals of all disciplines including financial advisers, consultants, administrators, actuaries, accountants, and attorneys. ARA is the coordinating entity for its five underlying affiliate organizations, the American Society of Pension Professionals and Actuaries (“ASPPA”), the National Association of Plan Advisors (“NAPA”), the National Tax-deferred Savings Association (“NTSA”), the ASPPA College of Pension Actuaries (“ACOPA”) and the Plan Sponsor Council of America (PSCA). Until recently, the membership of ARA was exclusively individuals rather than companies. On January 1, 2018, PSCA became part of ARA and has a membership made up primarily of employers who sponsor retirement plans. As a result, the ARA is a “hybrid” association that has both individual and corporate members.

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<sup>1</sup> Definition of “Employer” Under Section (3)(5) of ERISA – Association Health Plans, 83 Fed. Reg. 614 (January 5, 2018).

## **Discussion**

ARA strongly supports the Proposal to allow AHPs and its goal of expanding access to employer-sponsored health care coverage for American workers. The firms that employ our members are typically small businesses. Most of these small businesses have less than 50 employees each and, as such, must go through individual underwriting to provide health insurance coverage for their employees. As you are aware, recent health insurance premiums for small businesses like these have risen dramatically, while levels of benefits available have diminished. These developments have made it increasingly more difficult for our members who own small businesses to continue to offer health insurance to their workers. The Proposal would benefit our small business owner members by providing greater flexibility on health insurance coverage available through an AHP as well as the economies of scale an AHP could provide. As such, we want to strongly encourage you to finalize the Proposal as soon as possible.

### **The Proposal Should Allow for AHP by Individual Membership Organizations**

Although we strongly support the Proposal, we would, however, recommend the final regulation be modified to permit the thousands of member-based associations that qualify for federal tax exemption under Internal Revenue Code Section 501(c)(6) the opportunity to sponsor an AHP. The Proposal contemplates that the association sponsoring the AHP would do so for the benefit of its members who are employers. Unfortunately, this would deprive thousands of associations whose membership is made up individual members the opportunity to sponsor an AHP. As previously indicated, ARA is a “hybrid” organization but is primarily made up of individual professional members who work in the retirement plan industry. All of our members are dedicated to America’s employer based private retirement system and improving retirement security for American workers. We also are a non-profit association exempt from tax under Internal Revenue Code Section 501(c)(6). As such, we are subject to IRS regulation and annual reporting to ensure we operate for the tax-exempt purposes set forth in our charter and by-laws.

The employers of our individual members are equally dedicated to our mission. Most encourage their employees to join ARA so that they can participate in our educational and professional credentialing programs. The vast majority of our individual members have their dues either paid or reimbursed by their employer. The interests of these employer firms are inextricably tied to the interests of our association. Although these firms are not formally members of ARA, their best interests are of prime concern to the leadership of ARA. We believe many would welcome an ARA sponsored AHP plan and would have trust that ARA leadership, and its duly elected Board of Directors, would be acting in their best interests.

The Proposal would unnecessarily limit the ability of member-based associations, such as ARA, to offer AHPs. ERISA section (3)(5) defines “employer” to include “a group or association of employers acting for an employer in such capacity.” There is nothing in the statute that would preclude a member-based association from acting in the best interests of the firms employing the association’s members. In the case of ARA, these employers are an integral part of our mission and their support is critical to our success. The same could be said for many other member-based

associations, particularly where the members and their employers share a common trade, industry, line of business or profession.

One of the most common types of member-based associations is a professional society or trade association that has qualified for federal tax exemption under Internal Revenue Code Section 501(c)(6). To qualify for this tax-exempt treatment, the organization must be operated for the specific purpose of promoting the common business interests of its members. It must file annual financial returns with the IRS and is subject to audit and other IRS enforcement activities to ensure it is fulfilling its tax-exempt purpose.

Professional societies, by definition, are made up of their individual, professional members. In many cases, the individual members are also the owners of the businesses that employ the professionals. Many of these employers are small businesses that could most benefit from an AHP. They should be permitted to join an AHP sponsored by their professional, membership-based associations.

The preamble to the Proposal requested comment on “other bases for finding a commonality of interest.” The DOL should recognize the extensive commonality of interest between the individual members of an Internal Revenue Code Section 501(c)(6) professional society and the businesses that employ those professionals. This commonality is sufficient to differentiate it from commercial-insurance-type arrangements and ensures that the association will be acting in the interests of the employers who join the AHP.

ARA recommends that the Proposal be modified to provide that a member-based association may sponsor an AHP that is offered to the employers of association members. Furthermore, in the case a non-profit organization that qualifies for exemption from tax under Internal Code Section 501(c)(6), control of an association by its members, whether individuals or employers, should be deemed sufficient to ensure that the association is acting on behalf of and in the best interests of the employers who join the association’s AHP.

### **DOL Should Hold Forum to Facilitate AHP**

Lastly, we disagree with those who suggest there will be no marketplace for AHPs. Small businesses in particular face continuing challenges in meeting the health care needs of their employees. They have been burdened by changing rules and ever-increasing premiums. AHPs will be in demand as a way for small businesses to pool together to reduce those costs. In addition, the wider variety of plan design options will be also be very attractive to small businesses. We believe that many associations will be very interested in exploring sponsorship of an AHP once the Proposal is finalized.

To more quickly move the AHP development process forward, ARA recommends that upon finalization of the proposal the DOL sponsor a forum for health insurers, service providers and associations interested in AHPs. There will be a need for dialogue among these parties to develop the right products that will fit the unique needs of AHPs, their association sponsors and the employers who will join them. A DOL sponsored forum will accelerate the development process and the availability of AHPs in the marketplace.

ARA looks forward to working with the Department on this initiative. We would welcome the opportunity to discuss these comments with you further. Please contact Craig Hoffman, ARA General Counsel, at (703) 516-9300 (ext. 128) or at [CHoffman@USARetirement.org](mailto:CHoffman@USARetirement.org) if you have any questions. Thank you for your time and consideration.

Sincerely,

/s/

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/s/

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