Jacobs Institute
of Women's Health
THE GEORGE WASHINGTON UNIVERSITY

March 5, 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,

The Jacobs Institute of Women's Health appreciates the opportunity to comment on the proposed rule "Definition of 'Employer' under Section 3(5) of ERISA - Association Health Plans." The Jacobs Institute of Women's Health's mission is to identify and study aspects of healthcare and public health, including legal and policy issues, that affect women's health at different life stages; to foster awareness of and facilitate dialogue around issues that affect women's health; and to promote interdisciplinary research, coordination, and information dissemination, including publishing the peer-reviewed journal *Women's Health Issues*.

We object to this proposed rule because it will result in many women once again facing higher premiums and struggling to obtain coverage for care that is disproportionately used by women. Under the proposed rule, AHPs might offer lower premiums to some consumers, but they would be lower due to cherry-picking plan members, skimpier coverage or benefits, and/or fewer protections against fraud and insolvency. In addition to these concerns about the rule's substance, we are also disturbed by a rulemaking process that fails to include in the Federal Register notice information important for assessing the proposal.

Substance of the Rule: Higher costs and worse coverage

Under the proposed rule AHPs would be exempted from Affordable Care Act (ACA) individual and small-group market protections, including the requirement to provide essential health benefits (EHBs). Plans will face financial pressure to drop benefits such as maternity care and mental health treatment that could attract higher-cost enrollees. If AHPs structure and market their offerings to attract younger and

healthier people, individuals and small employers with higher claim costs would be left in a shrinking risk pool where premiums would rise substantially. Those with AHP coverage would also face the risk of developing a condition — pregnancy, for instance — that would be covered by an ACA-compliant plan but not by their AHP plan, and being unable to afford the necessary care.

Prior to the ACA, 75% of individual market plans did not cover delivery and inpatient maternity care.[1] Plans that did include maternity services were not necessarily comprehensive or affordable; for instance, several plans charged a separate maternity deductible of as much as $10,000.[2] The proposed rule would open the door to women once again bearing unequal risks and financial burdens.

AHPs have a troubling history of fraud and financial instability. Research found that between 2000 and 2002, 144 operations left over 200,000 policyholders with over $252 million in medical bills.[3] No federal financial standards guarantee AHPs will remain financially stable, and past experiences show that they can become insolvent when medical claims exceed an association's ability to pay.[4] We fear 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 ACA provided more oversight and protection.

We strongly encourage the Department to retain the nondiscrimination provision that prevents AHPs from using health factors to determine eligibility or set premiums. However, exemption from other ACA consumer protections, such as essential health benefits and guaranteed issue, would effectively allow such discrimination. To more meaningfully prevent discrimination, the Department should apply the EHB, guaranteed issue, and single-risk pool requirements to AHPs.

Process of the Rule: Missing Information and Analysis

The Department's enforcement efforts and policy analyses relating to Multiple Employer Welfare Arrangements (MEWAs) leave it well positioned to provide in-depth information and analysis regarding the prevalence, cost, and potential federal responses to fraud by AHPs. However, the rule's preamble does not contain such in-depth information or analysis, even though the risk of fraud and the likelihood of agencies being able to detect and respond appropriately are crucial to evaluating the likely impacts of the proposed rule. We request that the rule be withdrawn and re-proposed after the Department has had time to analyze and report on the relevant fraud-related information to which it has access.

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[1] Kaiser Family Foundation. Analysis: Before ACA Benefits Rules, Care for Maternity, Mental Health, Substance Abuse Most Often Uncovered by Non-Group Health Plans. June 14, 2017. Available: http://kaiserf.am/2Fno4ty

[2] National Women's Law Center. Turning to Fairness: Insurance discrimination against women today and the Affordable Care Act. March 2012. Available: https://www.nwlc.org/sites/default/files/pdfs/nwlc_2012_turningtofairness_report.pdf

[3] Kofman, M. Association Health Plans: Loss of State Oversight Means Regulatory Vacuum and More Fraud. Georgetown University Health Policy Institute. Summer 2005. Available: https://hpi.georgetown.edu/ahp.html

[4] Kofman M, Bangit E, Lucia K. MEWAs: The Threat of Plan Insolvency and Other Challenges. The Commonwealth Fund: Task Force on the Future of Health Insurance. March 2004. Available: http://www.commonwealthfund.org/usr_doc/kofman_mewas.pdf

Thank you for this opportunity to comment in response to the proposed rule, Definition of “Employer” under Section 3(5) of ERISA – Association Health Plans. If you have any questions or concerns about our recommendations, please contact Jacobs Institute managing director Liz Borkowski at 202-994-0034 or borkowsk@gwu.edu.