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March 6, 2018

Office of Regulations and Interpretations  
Employee Benefits Security Administration  
Room N-5655  
U.S. Department of Labor  
200 Constitution Avenue NW, Washington, DC 20210

Attention: Definition of Employer—Small Business Health Plans RIN 1210-AB85

To Whom It May Concern:

I am writing on behalf of the HIV Medicine Association (HIVMA) to provide comments to the proposed Department of Labor rule, *Definition of “Employer” Under Section 3(5) of ERISA-Association Health Plans*. HIVMA represents more than 6,000 HIV clinicians and researchers working on the frontlines of the HIV epidemic across the country.

The Patient and Protection Affordable Care Act’s (ACA) standards and protections governing individual and small group private insurance markets have been critical to improving access to comprehensive and affordable coverage by people living with HIV. We are concerned that the proposed rule’s weakening of the ACA’s consumer protections for Association Health Plans (AHPs) will leave our patients without affordable coverage options and worsen the HIV epidemic.

The ACA requires policies sold through AHPs to individuals and small groups to be regulated under individual and small group market standards that comply with ACA rules and protections. We are concerned that the proposed rule would create significant instability and inequality in the non-group health care insurance market leaving individuals with pre-existing conditions like HIV without affordable health care coverage options.

AHPs have a long history of fraud and financial insolvency that some states have been successful at mitigating to the benefit of consumers and providers who otherwise are left with unpaid medical bills or claims.<sup>1</sup> The proposed rule could limit state authority to protect consumers from these risks. The proposed rules also would make it easier for AHPs to form without a common interest beyond shared industry or geography, solely to offer health insurance coverage. We are concerned that the lack of fiscal oversight and clear regulatory authority over coverage options of AHPs will put people with HIV

and providers at risk in addition to compromising the coverage options available through the regulated individual health insurance market.

We urge HHS to consider the following recommendations in addition to the detailed comments submitted by the HIV Health Care Access Working Group.

### **Maintain Consumer Protection and Benefits Standards**

The proposal to exempt AHPs from many of the federal standards and protections that apply to individual and small group plans by allowing AHPs to offer coverage as large employer plans would jeopardize access to health care coverage for our patients with HIV and others with pre-existing conditions. The Essential Health Benefits (EHBs) and restrictions on premium ratings are important to prevent the discrimination in plan design and premium setting that was standard practice prior to the ACA and that left people with HIV without affordable health care coverage.

While the proposed rule prohibits AHPs from restricting membership in the association based on health factors or charging higher premiums to an employer based on the health of its employees, the proposed rule would still offer AHPs mechanisms for doing so by allowing for rate adjustment based on employment status or geographic location. Additionally, although the proposed rule would prohibit AHPs from discriminating against employer members, AHPs that are treated as large group plans would be able to vary premiums based on gender, age and group size of their overall enrollee pool. In addition to using permissible “employment-based” criteria as a proxy for health status, AHPs could further discriminate against individuals with pre-existing conditions by structuring eligibility rules, benefit designs, and marketing practices in ways that encourage enrollment by healthier individuals and groups while discouraging less healthy individuals and groups.

DOL requests comment from stakeholders on its proposal to prohibit AHPs from treating different employer-members as different groups based on the health factors of individual employees. We strongly object to allowing AHPs to treat different employer members as different groups based on health factors as it would open the door to discrimination based on health factors and leave healthier consumers without the assurance that their coverage will be sufficient if and when they do become sick or require more intensive health care services.

### **Sustain State Regulation and Oversight**

Due to the widespread fraud and insolvency associated with AHPs, Congress amended ERISA in 1983 to clarify that states have authority to regulate such arrangements. The proposed rule suggests that states would continue to have regulatory authority over health insurance issuers and the insurance policies they sell to AHPs; however, the proposed rule does not establish a clear regulatory authority over AHPs, and we fear that state attempts to protect consumers from the risks historically associated with AHPs would be preempted if they are found to be inconsistent with the federal approach.

The proposed rule points to the Department’s authority to exempt AHPs from state insurance regulations, and seeks comment on whether the Department should use this authority to exempt AHPs from state oversight and insurance standards. We oppose this exercise of authority and urge the

Department not to take any actions that weakens state regulation and oversight of AHPs or that otherwise preempt state law intended to preserve important consumer protections.

### **Keep ACA-Compliant Coverage Affordable**

If the proposed rule were finalized in its current form, AHPs could bypass important ACA protections and structure eligibility rules, benefit designs, and marketing practices in ways that encourage enrollment by healthier individuals and groups while discouraging enrollment of less healthy individuals and groups such as people living with HIV. AHPs would be competing in the same market as individual and small-group plans, but would be subject to different rules that allow for the adjustment of eligibility rules and benefit designs to attract healthier enrollees. With a healthier risk pool, AHPs could charge lower premiums and siphon off healthier individuals from the ACA-compliant plans in the individual and small group markets. This would be detrimental to people with HIV and millions of others with pre-existing conditions who would be priced out of the ACA-compliant coverage.

We are deeply concerned that this proposed rule and the proposed rule to expand access to short-term health plans will result in a segregated non-group health insurance market leaving those with chronic and potentially disabling conditions without viable and affordable health care coverage options. In the case of people with HIV, we stress that ensuring continuous affordable access to care and treatment is a public health imperative, and that rules that threaten coverage for people with HIV will result not only in increased morbidity and mortality for people with HIV, but also will fuel a rise in new HIV infections in the US. HIVMA strongly urges the department to consider the harmful impact of the proposed rule on people with HIV and millions of other Americans who are dependent on the health care coverage available through the individual and small group market and withdraw this proposal. Please contact the HIVMA Executive Director Andrea Weddle at [aweddle@hivma.org](mailto:aweddle@hivma.org) with questions regarding our comments.

Sincerely,



Chair, HIVMA Board of Directors

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<sup>1</sup> The Commonwealth Fund. President Trump's Executive Order: Can Association Health Plans Accomplish What Congress Could Not? October 2017. Online at: <http://www.commonwealthfund.org/publications/blog/2017/oct/association-health-plans-executive-order>.