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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, D.C. 20210

Re: Definition of Employer–Small Business Health Plans (RIN 1210–AB85)

Submitted via: <http://regulations.gov>

The National Association of Manufacturers (NAM) is pleased to submit these comments on the proposed rule under Title I of the Employer Retirement Income Security Act (ERISA). This proposal seeks to expand the definition of “employer” and broaden criteria under ERISA section 3(5) for determining when employers may join together for the purpose of offering health insurance under an existing or new arrangement. This comment seeks to articulate the views of manufacturers and NAM-affiliated associations on the adoption and implementation of Association Health Plans (AHP), also referred to as a small business health plan in this notice of proposed rulemaking (NPRM).

The NAM is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12.5 million men and women, contributes more than \$2 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

Approximately 98 percent of NAM member companies offer health benefits to maintain a healthy workforce and to attract and retain talent. Moreover, manufacturers offer health benefits because they believe it is the right thing to do for their employees. For many manufacturers, securing affordable health care for employees and their families at competitive rates is not only an ongoing challenge, but an increasingly expensive proposition, especially for small employers. While manufacturers go to great lengths to provide a robust health insurance offering to employees, manufacturers are united in the belief that efficiencies and improvements can be gained. Removing regulatory barriers to address cost and inefficiency and improving access to quality benefits are essential to reforming health care.

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For over a decade, the NAM has supported efforts to increase small businesses' health insurance options through AHPs. Legislation to enable AHPs, H.R. 1101, the Small Business Health Fairness Act, passed the House of Representatives in March 2017 and was strongly supported by the NAM through our Key Vote congressional scorecard program.

### **Ongoing Challenges to Accessing Affordable Coverage for Small and Medium-Sized Manufacturers**

Unfortunately, the cost of health care remains a top business concern for both large and small manufacturers based upon quarterly survey results conducted by the NAM that focus on manufacturing sentiment. While the most recent NAM Outlook Survey in December underlines a greatly improved overall business outlook, with optimism reaching an all-time high among manufacturers, there has been limited relief to address escalating health care costs. Rising health care costs impact all facets of a company beyond higher premiums. Hiring new workers, maintaining competitive pay rates and making capital investments as well as researching and developing new products are all stymied when health care costs are unrestrained.

The Patient Protection and Affordable Care Act (ACA) made health care more challenging and costly. Part of the challenge that the ACA ushered in was a paradigm shift in health care choices available to manufacturers and other business owners. Options that were once available became more limited over time. Businesses, including small and medium-sized manufacturers, need the flexibility, bargaining power and competitive options available to large employers so that they can always find the best and most cost-effective plan for employees. The proposal to make group plan models available to associations and their members is a welcome development fully supported by manufacturers.

### **Benefits of ERISA**

Approximately 175 million Americans have health, retirement and other valuable benefits provided by their employer under a nationally uniform framework established by ERISA. This uniform framework is the backbone of the employer-based health care system because it allows large employers to maintain national benefit plans, which provide employees comprehensive, affordable plan options. Manufacturers are pleased the Department of Labor's (DOL) Employee Benefits Security Administration (EBSA) has undertaken this NPRM to expand the definition of employer under Title I of ERISA. It is a critical change that is part of a broader health care reform effort that will improve both access and cost for employers who are not eligible or too small to offer ERISA-style plans. Additionally, the NPRM, once finalized, will achieve the DOL and the administration's goal of expanding access to affordable health coverage across state lines.

### **Arrangements Already in Place and Maintaining Existing Plans Must be a Priority**

Some business associations, including several NAM members, already offer health insurance to their members under Multi-Employer Welfare Arrangements (MEWAs) and others do not because of restrictions at the state level or marketplace uncertainty. There are

approximately 150 MEWAs already in place around the country and the NAM supports protecting these arrangements as they currently exist. To protect existing MEWAs and those who receive benefits under them, the NAM requests that EBSA's final rule grandfather established plans so they can continue to operate and grow as entities that offer health benefits to small businesses. The exemption would ensure continued choice for small businesses and allow individuals participating in an existing MEWA to continue to choose from plans regulated at the state level.

### **Commonality of Interest and Organizational Structures**

While MEWAs exist and are successful, allowing small businesses to come together through an established association structure to access nationally-based health insurance that is affordable and quality-driven is strongly supported by manufacturers because small and medium-sized manufacturers do not enjoy the same economies of scale as their larger cohorts. The broadening of the definition of employer goes a long way to address some of the current shortfalls associated with state-based MEWAs. Expanding group coverage to include members of a trade association who, by definition, share a commonality of interest is an appropriate proposal presented by EBSA. However, to assure long-term certainty, the definition of commonality of interest must move beyond interpretive guidance and be codified in the final rule.

The NAM believes its membership falls under the appropriate criteria to meet DOL's existing definition of commonality of interest. NAM membership qualifications are established in the bylaws of the association. Requirements of membership fall into three categories as summarized here:

- 1) manufacturing members with manufacturing operations in the United States;
- 2) manufacturing association members that represent entities engaged in manufacturing in the United States; and
- 3) cooperating members that specialize in services that support manufacturing members.

Approximately, 85 percent of NAM members are small and medium-sized businesses. There are more than 300 association members and state association groups that also belong to the NAM and, as detailed above, these associations are considered full members of the NAM. In total, the NAM includes approximately 14,000 members. The NAM believes the manufacturing sector's commonality of interest test is met under the NPRM. However, in a narrow reading of the commonality of interest test, associations like ours—those with members from allied or supporting industries—may not fall into the definition. Therefore, the NAM urges the DOL to adopt a broad reading of what constitutes a commonality of interest, including looking at a shared economic interest, a genuine organizational relationship, organized cooperation and/or a common purpose between employer members.

Manufacturers agree with the NPRM's proposed governance requirements for the establishment of AHPs. Longstanding organizational structures with formal and well-established governance practices in addition to clear and closely followed bylaws ensure

the necessary guardrails and protections for both employers and employees who are participating in an AHP. The DOL could also explore additional safeguards, such as stop loss requirements and other fiduciary arrangements.

### **Insurance Across State Lines and Addressing State Regulations**

While the NPRM does not expressly authorize the sale of insurance plans across state lines, the rule creates the conditions and a new pathway for accessing interstate insurance for those who meet the criteria set out in the NPRM. However, the NPRM does not fully address the regulatory framework concerning the interplay of state and federal requirements for a self-insured AHP that is established in one state but offered on a national basis. Manufacturers urge EBSA to create regulatory certainty and avoid a 50-state patchwork of regulations for large group self-insured plans by exercising its authority under Subsection 544(b)(6)(B) of ERISA and issuing a class exemption for self-insured plans. Fully-insured plans would not face this challenge due to the nature of their obligations and responsibilities under ERISA.

### **Risk Pools, Nondiscrimination and Consumer Protections**

Manufacturers believe that current health markets accessed by businesses for health coverage whether they be individual, small group or large group coverage will remain competitive and robust, even with the anticipated introduction of more AHPs. Expanding AHPs and increasing health care options for small businesses will only enhance current health insurance offerings and ultimately will drive greater efficiencies and innovations for individuals and families, ultimately providing a new tool to help small businesses manage rising health care costs.

Manufacturers support the nondiscrimination protections in the NPRM to maintain fair and appropriate balances in risk pools, but also to protect consumers as well as groups and associations who are offering AHPs. However, the NAM urges EBSA to clarify its language in this regard. In addition to health status, EBSA should affirm that gender and sexual orientation should not be used as a basis for discrimination. Further, no federally-protected class status should be used as a basis for discrimination, including race, color, religion or creed, national origin or ancestry, sex, age, veteran status, or citizenship.

### **Staying Power Required for Success of AHPs**

To assure the long-term success of AHPs, regulatory certainty and stability are critical. The benefits planning horizon is not only long-term, but a multi-year endeavor. To that point, the NAM urges EBSA to review comments thoroughly but efficiently so that associations can quickly advance and implement a quality AHP offering to their members in the near term.

### **Conclusion**

Because manufacturers have a proud tradition of providing health care to employees, the NAM is eager to advance market-based policy changes that expand

coverage, reduce health care costs and strengthen ERISA. The economies of scale that have come to define employer-sponsored coverage create a vehicle to design benefits that are more flexible, innovative and efficient, but this only works if health care innovation is encouraged and permitted. The NPRM is an excellent start to achieving those goals. However, associations that offer health insurance to their members will need ongoing regulatory certainty, stability and clarity. Manufacturers appreciate DOL's efforts to ensure that AHPs, including self-insured plans, are not subject to varying state regulations that hinder the overall stated goals of the NPRM.

The NAM and its membership want employees to thrive, be healthy and share in our sector's success. We appreciate EBSA's effort to address concerns articulated in this submission and welcome the opportunity to provide additional feedback upon request.

*Comments Submitted by:*

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