



March 6, 2018

The Honorable Preston Rutledge  
Assistant Secretary  
Employee Benefits Security Administration  
U.S. Department of Labor  
Room N-5655  
200 Constitution Avenue NW  
Washington, D.C. 20210

Submitted electronically: <http://www.regulations.gov>

**Subject: Definition of “Employer” Under Section 3(5) of ERISA – Association Health Plans**

Dear Assistant Secretary Rutledge,

Independence Blue Cross (“Independence”) would like to offer comments in response to the Employee Benefits Security Administration’s (EBSA) Notice of Proposed Rulemaking (NPRM) on the *Definition of “Employer” Under Section (3)(5) of ERISA – Association Health Plans*, as issued in the Federal Register on January 5, 2018 ([83 Fed.Reg. 614](#)).

Independence, its subsidiaries, and affiliates touch the lives of nearly eight million consumers across the United States through a diverse offering of health care coverage options. We offer a variety of products, serving the individual, small and large group markets, as well as government markets. We hold a long-standing commitment to providing health care coverage in our community and believe it imperative to offer our perspective on the NPRM as it relates to the expansion of association health plans (AHP) and the definition of “employer” under ERISA.

As the leading health insurance organization in Southeastern Pennsylvania for 80 years, we have been enhancing the health and well-being of the people and communities we serve by delivering innovative and competitively priced health care products and services. We are committed to the health and well-being of our members and our community, which numbers nearly 2.5 million strong. For the past two years, Independence has been the sole health insurance organization in the region offering on-Exchange individual market comprehensive health coverage and we remain committed to continuing to offer this coverage.

We agree with the EBSA’s goal to improve choice, competition and affordability in the marketplace but are troubled by some of the proposals within this NPRM. The existing regulations and administrative guidance on AHPs have served to prevent fraud and abuse, protect consumers, and ensure the stability and solvency of employer-sponsored health care coverage. While AHPs may be a viable option for some employers, adequate safeguards and necessary oversight are imperative to ensure that the coverage meets the needs of those covered while meeting the fiscal and regulatory

standards that protect both employees and employers. We fear that the NPRM seeks to alter the protective framework too quickly. Without careful consideration and thoughtful implementation, some of the proposed revisions could have serious negative consequences for consumers as well as the individual and large group marketplaces.

We would also strongly encourage the EBSA to consider the thoughtful recommendations that our trade associations, America's Health Insurance Plans and the Blue Cross Blue Shield Association, have offered in response to the NPRM.

While we support the goal of expanding access and increasing competition and choice in health insurance, as well as working towards lower cost options for all Americans, the risks of fraud and insolvency AHPs pose to consumers give us tremendous pause. Creating a different set of rules for different market actors will disturb insurance markets in a way that runs counter to the EBSA's stated objectives and we strongly encourage you to reconsider the direction of this proposal.

We encourage the EBSA to retain existing regulations and sub-regulatory guidance, which serves to protect consumers who depend on coverage from a variety of health insurance markets, to protect the role of state governments in regulating insurance, and to establish guardrails to protect consumers who may purchase these products. Additionally, the impact on market stability for existing commercial and employer insurance markets must be very carefully weighed. Any final rule should avoid the creation of inconsistent treatment of insurance contracts and employee protections in group coverage.

Our first concern focuses on the risk-pooling arrangements that would be substantially threatened by creating parallel markets. As currently proposed, some individuals and small groups will be subject to traditional Affordable Care Act (ACA) rules while others will not. Such parallel rules would limit our ability to measure risk, adjust premiums, and offer sustainable products on the market. The NPRM would allow new AHPs to selectively target the best risk, particularly if they are allowed to rate for health status at the employer level. The adverse selection impact of not having to comply with the same insurance market rules as the insured market would be particularly large if an AHP can offer lower rates to the healthiest employer groups, including sole proprietors. As proposed, AHPs subject to the new requirements could be structured to cherry pick the best risks from the existing ACA small group and individual markets by offering lower prices (as compared to ACA market rates) for lower-risk groups and higher prices for higher-risk groups. This would result in the healthiest small groups and sole proprietors leaving the ACA markets, leading to subsequent rate increases for the persons remaining in the ACA small group and individual markets. This would have a destabilizing impact on the ACA individual and small group markets, which are required to comply with adjusted community rating rules.

Secondly, we are concerned that the proposed "commonality of interest" test is too broad and will lead to associations that lack any vested interest in the health outcomes of their members. Present guidance from the Department of Labor requires an AHP to

be established by a *bona fide* group or association. While the proposed rule in no way eliminates this standard, it adds a new commonality of interest test that opens the door to groups or associations comprised of employers that lack any substantial relationship to one another. This broad threshold to claim association status raises serious concerns of spurious associations forming solely to offer health coverage. We believe the *bona fide* association test should remain the standard for determining whether a group or association would qualify as an employee welfare benefit plan under ERISA.

We are also troubled by the proposal to allow unrelated employers to form AHPs based on geography. This language seems overly broad and diminishes the likelihood that businesses will bear a reasonable relationship to one another. This presents a regulatory burden for insurers and plan sponsors who must design a health plan that complies with state laws that will likely vary significantly in their minimum requirements and compliance standards. Many associations will likely choose to operate under the laws of the least burdensome state and leave consumers without legal recourse. Furthermore, since employers have no other affiliation with other member-employers, a disproportionate number of employers may join for what appears to be a much more affordable coverage plan, yet lacks solvency oversight and consumer protections that can ultimately lead to major fraud and abuse practices.

Finally, the proposed rule does not directly address the issue of state pre-emption but invites comments in the request for information. Independence believes that states should continue to have the authority to regulate AHPs. We are concerned about the lack of state oversight and enforcement discussion in the proposed rule and strongly believe that a clear statement reaffirming that regulatory authority is vested in the states is critical to protecting consumers. A final rule that is ambiguous on state authority risks creating an environment where we repeat the mistakes of the past, potentially leaving consumers with unpaid medical bills and little recourse. States have proven to be best situated to regulate traditional insurance products, as well as AHPs, within their jurisdiction and must continue to be allowed to do so.

We thank DOL for this opportunity and urge you to carefully consider our comments and the impact this rule may have on consumers and the existing insurance marketplace. We believe in protecting the stability and affordability of health care coverage to members in our community and Americans across the country. Please do not hesitate to contact me directly if you have any questions (Geraldyn.Trujillo@ibx.com, 215-241-3818).

Sincerely,



Geraldyn Trujillo, MPP  
Director, Office of Public Policy