

The Honorable Julie A. Su
Acting Secretary
U.S. Department of Labor
200 Constitution Avenue NW
Washington, D.C. 20210

Re: RIN 1210-AC16, Definition of Employer-Association Health Plans

Dear Acting Secretary Su:

I write to identify several inadequacies in the above-captioned proposal.

First, the proposal fails to give good reasons for rejecting the 2018 association health plan rule's geographic commonality provision. The question is whether geographic commonality is adequate to create "some commonality of interest and genuine organizational relationship unrelated to the provision of benefits."¹ Manifestly it can. Geography-based business groups have been a feature of the American economy for many generations. It is easy to understand why: businesses often share an interest in the existence of prosperity, safety, a thriving economy, a skilled and abundant workforce, etc. within their shared state or urban area. This interest is entirely unrelated to the provision of benefits. Indeed, the proposal *admits* that "the existence of state-wide chambers of commerce demonstrates that certain statewide groups might have shared interests such that they could create an association."² Having made that admission, the proposal fails to explain in what way the geographic commonality provision is "too loose."³ The proposal mostly critiques the reasoning of the 2018 rule, but that is not enough; to make the affirmative change the proposal seeks, it must offer its own reasons for concluding that shared location does not create the requisite commonality. Nor is the existence of difficult line-drawing problems with respect to other potential bases for commonality enough to show that shared geography does not create commonality—among other reasons, because these line-drawing problems would support *expanding* the recognized bases of commonality just as much as *restricting* them.

Second, the proposal fails to give adequate reasons for rescinding those provisions of the 2018 rule with which it does not find fault. The proposal explains that it declines merely to excise the working-owner and geographic provisions because the surviving rule "would be missing key elements necessary for a comprehensive framework for a group or association to demonstrate that it is acting 'indirectly in the interest of an employer.'"⁴ But then again, rescinding the entire

¹ 88 Fed. Reg. at 87969.

² *Id.* at 87977.

³ *Id.*

⁴ *Id.* at 87978.

2018 rule *also* fails to render a comprehensive framework. Indeed, total rescission results in an even less comprehensive framework than partial rescission would do, because it would throw interested parties back on a body of law composed entirely of disparate guidance documents issued over many decades and restricted by their terms to the parties and specific factual scenarios at issue.

Third, and relatedly, the proposal fails to acknowledge the substantial costs of uncertainty that groups and associations and their members must bear in consequence of having to rely on guidance that the proposal itself admits is “not precedential.”⁵ One main benefit of the 2018 rule was to offer a framework that was both easily intelligible and suitable for reliance. The proposal would forego that benefit without so much as acknowledging its loss, let alone finding this loss justified by benefits of some sort.

Fourth and finally, the proposal’s discussion of costs is astonishingly anemic. It consists of a single paragraph stating that, because the 2018 rule was never fully implemented, the rescinding rule would result in *no* costs.⁶ But reliance costs are not the only costs that matter. To assess costs fully and adequately, the Department must do far more; it must acknowledge all the ways people would be worse off on account of rescinding the 2018 rule rather than implementing it insofar as it could have been implemented in light of the district court’s decision striking down some (not all) provisions of the 2018 rule. These detriments include the loss of certainty mentioned in the preceding paragraph as well as other losses.

Sincerely,

Paul J. Ray

⁵ *Id.* at 87978.

⁶ *Id.* at 87980.