February 19, 2024

The Honorable Lisa M. Gomez
Assistant Secretary
Attn: Proposed Rescission of AHP Final Rule RIN 1210-AC16
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: Comments on Proposed Recission of AHP Final Rule, RIN 1210–AC16

Dear Assistant Secretary Gomez:

I. The Association of Washington Business ("AWB" or the "Association") welcomes the opportunity to comment on the notice of proposed rulemaking (RIN 1210–AC16) issued by the Department of Labor, Employee Benefit Security Administration (the "Department" or "DOL") regarding the proposed recission of the Department's 2018 rule entitled "Definition of Employer—Association Health Plans" (2018 AHP Rule) (the "Proposed Rule"). AWB is a statewide, *bona fide* trade association that will celebrate its 120th birthday this year. AWB members and their eligible employees enjoy access to ERISA-covered employee health benefits through multiple industry trusts that comprise the AWB HealthChoice Employee Benefits Trust (collectively, "the Trust"). AWB fully supports the DOL's proposal to rescind the 2018 AHP Rule, but urges the agency to refrain from any regulatory action that would alter or rewrite the guidance in place governing Pathway 1 association health plans (AHPs).

The AWB HealthChoice Health Plan Trust

The Trust is a fully-insured Pathway 1 AHP that serves industry-specific employer members of AWB. The Trust has been in operation since 1996 and offers comprehensive, fully-insured health care coverage that has continuously complied with applicable state and federal laws. The health plans offered under the Trust meet all state and federal benefit mandates and are guaranteed issue. In fact, some of the coverage offered through the Trust exceeds what is mandated by state and federal law.

As a Pathway 1 AHP, the Trust has relied on pre-2018 DOL guidance and regulations for more than two decades. With that in mind, our comments are focused mainly on the importance of retaining Pathway 1 AHPs, which, like the Trust, have benefitted small employers and their employees and dependents for decades. The comprehensive, fully-insured coverage offered through the Trust allows small employers, including those who are not required to offer healthcare benefits to employees and their dependents, to offer benefits that compete on a more level playing field with larger competitors.

Nearly 30,000 employees and their family members rely on coverage through the Trust. Almost 40% of the employers participating in the Trust did not offer health coverage to employees and dependents before enrolling. The Trust offers group health care coverage to employers with at least two employees and does not and has never offered coverage to individuals. AWB and the Trust serve employer groups only.

II. The DOL Should Take No Action Beyond Rescinding the 2018 AHP Rule

The Proposed Rule seeks comments on whether DOL should undertake further rulemaking that codifies, amends, or replaces the pre-2018 AHP Rule guidance governing AHPs. Our view is that after the 2018 AHP Rule is rescinded, no further regulation of AHPs is necessary in light of the decades of sub-regulatory guidance and court decisions upholding that guidance that have allowed AHPs to responsibly provide valuable and valued benefits to American workers and their families.

As the DOL acknowledges in the preamble to the Proposed Rule, the pre-2018 AHP Rule guidance regarding Pathway 1 AHPs has been consistently applied and universally upheld by the courts.[1] Indeed, even during the recent litigation that resulted in the 2018 AHP Rule being set aside, the court commented favorably in multiple instances regarding the pre-2018 sub-regulatory guidance.[2] Such guidance has been viewed for many years as a reasonable interpretation and application of the term "employer" in the ERISA statutory text. This guidance was in place when the Affordable Care Act ("ACA") was enacted and was not modified at all by the ACA or any subsequent Congressional or administrative action. Accordingly, we urge the

[1] See also *Proposed Rule Would Roll Back Expansion of Association Health Plans*, Corlette, Sabrina, Health Affairs, December 20, 2023, available at https://www.healthaffairs.org/content/forefront/proposed-rule-would-roll-back-expansion-association-health-plans("DOL notes that its pre-2018 guidance on these issues, largely issued in the form of Department Advisory Opinions, has been universally upheld by the courts.")

[2] *See New York v. U.S. Dep't of Labor*, 363 F. Supp. 3d 109, 119-20, 130-35 (D.D.C. 2019) (explaining longstanding guidance and comparing 2018 AHP Rule disfavorably to such guidance).

DOL to maintain and not deviate from pre-2018 AHP Rule guidance that has been in place for decades to ensure that health coverage for tens of thousands of employees of small businesses and their families in Washington State is not disrupted.

AWB would like to express an additional related reason why the DOL should not deviate from its pre-2018 AHP Rule guidance. Specifically, modifying or narrowing this guidance will undermine administrative deference, making the DOL's position more open to challenge through litigation and leading to extensive uncertainty for the regulated community and the health care customers they serve. After all, the longstanding position of the DOL expressed through sub-regulatory guidance can be entitled to administrative deference where persuasive.[3]

There is no question that the pre-2018 AHP Rule guidance has been relied on by many AHP providers (including AWB) and treated as persuasive by numerous courts (including the court enjoining the 2018 AHP Rule). The DOL, itself, in numerous documents and in both the 2018 rulemaking and this proposed rulemaking, has recognized the effectiveness and persuasiveness of that guidance. For example, in the preamble to 2018 AHP Rule, the DOL expressed that, "The Department's historical approach to these issues was designed to ensure that the Department's regulation of employee benefit plans is focused on employment-based arrangements, as contemplated by ERISA, rather than merely commercial insurance-type arrangements that lack

[3] See *Skidmore v, Swift & Co.*, 323 U.S. 134, 140 (1944); *see also United States v. Mead Corp.*, 533 U.S. 218, 234-38 (2001) (determining Customs ruling letter would receive *Skidmore* deference depending on its persuasiveness).

the requisite connection to the employment relationship."[4] And in the preamble to Proposed Rule, the DOL emphasized:

> The Department's pre-rule guidance is consistent with the criteria articulated and applied by every appellate court, in addition to several federal district courts, that considered whether an organization was acting in the interests of employer-members. Moreover, to the Department's knowledge, no court has found, or even suggested, that the pre-rule guidance criteria too narrowly construe the meaning of acting "indirectly in the interest of an employer" under section 3(5) of ERISA.") (footnote omitted).[5]

Indeed, the existence of court decisions uniformly following this guidance is compelling on the point of persuasiveness and supports continued DOL adherence to this precedent so as not to lose the certainty and reliability of guidance that has stood the test of time.

Ultimately, given the longstanding, persuasive, and settled nature of this administrative precedent, upon which we have relied and which has been applied on a widespread basis to allow for Pathway 1 AHPs, it would be arbitrary and capricious for the DOL to abandon its pre-2018 AHP Rule guidance at this juncture without action from Congress. The reliance interest here is paramount and requires that only the 2018 AHP Rule is rescinded. At the very least, if the regulatory landscape

[4] 83 Fed. Reg. 28912, 28914 (June 21, 2018).

[5] 88 Fed. Reg. 87968, 87969 (Dec. 20, 2023).

governing Pathway 1 AHPs is in any way altered, there must be a subsequent rulemaking, consistent with the Administrative Procedure Act and the safeguards included under EO 12866, that fully analyzes proposed changes to the governing law and the costs and harms that could result from modifying or narrowing the existing guidance. We trust that the DOL is not considering modifying the pre-2018 AHP Rule guidance at this juncture, but we raise these procedural and substantive concerns about doing so in order to highlight the importance of not modifying the guidance in this rulemaking and instead allowing it to remain the position of the DOL.[6]

If, however, the DOL were to decide to go beyond rescission of the 2018 AHP Rule, such action would not be a logical outgrowth of the Proposed Rule, which is laser focused on the issue of whether to rescind the 2018 AHP Rule, a completely separate AHP pathway from the one established by the pre-2018 AHP Rule guidance. The latter guidance was unaffected by the 2018 AHP Rule and will be unaffected by any rescission. Thus, any change in the pre-2018 AHP Rule guidance would be a surprise, would almost certainly lack an adequate record, would not follow or be a logical outgrowth from what was noticed in the Proposed Rule, and, therefore, would not withstand a legal challenge.[7]

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[6] In further support of the above comments, we would also respectfully note that the DOL has expressly indicated in the Proposed Rule that any potential action beyond simply rescinding the 2018 AHP Rule would be reserved for "future rulemaking." See Proposed Rule, 88 Fed. Reg. at 87978-79 ("The public comments will inform the Department's decision on whether to finalize this proposal to rescind the 2018 AHP Rule and will also assist the Department in determining if it should engage in **future rulemaking** on AHPs under ERISA section 3(5).") (emphasis added).

[7] *See generally Shell Oil Co. v. EPA*, 950 F.2d 741, 747 (D.C. Cir. 1991) ("The relationship between the proposed regulation and the final rule determines the adequacy of notice. A difference between the two will not invalidate the notice so long as the final rule is a "logical outgrowth" of the one proposed. If the deviation from the proposal is too sharp, the affected parties will not have had adequate notice and opportunity for comment.") (citation omitted).

Finally, even if DOL were to hypothetically decide to encode the pre-2018 AHP Rule guidance, that proposed codification should be presented to the regulated community and other impacted stakeholders in a separate, future rulemaking. After all, the regulated community could offer valuable insights into how the guidance could be encoded (and even interpreted in the potential preamble), and there would likely be many comments focused on how that encoding and interpreting occurs.

III. The Washington State AHP Market

The Trust complies with federal law and the health reforms adopted with bi-partisan support of both the Washington state legislature and the governor in 1995. It and all Washington State AHPs are legacy Pathway 1 AHPs, established and maintained under the DOL's pre-2018 AHP Rule well-established guidance and governing statutes, and have continuously operated to the present without financial impairment. As mentioned above, health benefits offered through the Trust (and other AHPs in Washington State) are some of the most generous in the market. Small businesses in our state are empowered and incentivized to provide their employees and their families with financially stable, fully-insured health care benefits on par with larger employers, and are secure in knowing that these benefits are underwritten and insured by licensed and regulated health carriers.

Historically, AWB members have renewed their coverage in the Trust at a very high rate, further demonstrating the Trust's stability and value to small employers. At the Trust's annual renewal effective December 1, 2023, ninety-four (94) percent of the member-employers renewed

their coverage. Additionally, Washington State has a very robust, stable small group market that operates successfully alongside the AHP large group market, providing additional choice and access for small employers. Rate increases in the small group market have been extremely low. For example, approved 2024 small group rate increases for our state's two largest insurers Regence Blue Shield and Premera Blue Cross are 6.7% and 5% respectively.

There is no data attributing adverse selection in the health insurance market to AHPs in Washington State (nor nationwide). In fact, AHPs have been a vital and positive component of the competitive group health insurance market in Washington State (and nationally). For decades, AHPs have enabled small employers and their employees and family members to access some of the most stable and service-oriented programs offering robust benefits at lower premiums. For example, a recent analysis by Forbes found that, "Washington residents with employer-provided health insurance pay some of the lowest premiums in the nation."[8] Employees with single coverage pay the third lowest nationwide and those with a family plan pay the second lowest in the nation.[9] Similarly, the 2022 Commonwealth Fund Report on state trends in employer premiums and deductibles shows employee premium contributions for family

[8] *Most and Least Expensive States for Health Care, Ranked*, Forbes (November 8, 2022) available at https://www.forbes.com/advisor/health-insurance/most-and-least-expensive-states-for-health-care-ranked/.

[9] Id.

coverage in Washington as *the lowest* of any state in the nation.[10] The report also states that Washington is the *second lowest* for single employee coverage, further demonstrating a healthy, stable employer health insurance market in the state.[11] Nationally, AHPs are not chilling ACA exchange market enrollment.[12]

The regulatory stability and quality health care that the pre-2018 AHP Rule guidance has fostered for decades is not something that should be undermined or cast aside. It is critically important that the DOL focus on its stated objective, rescinding the 2018 AHP Rule, and not call into question the underlying guidance that has been relied on by so many for so long, and which has been commented on favorably by courts as reasonable interpretations of ERISA's statutory text. Any instability in this area could impact the industry in ways that will harm AHP participants and beneficiaries and their access to quality health care.

IV. Conclusion

In conclusion, we thank the DOL for inviting our comments and urge the agency to conclude that it would best serve small employers and their employees and dependents who rely

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[10] *State Trends in Employer Premiums and Deductibles, 2010-2020,* The Commonwealth Fund (January 12, 2022) (Exhibit 4), available at https://www.commonwealthfund.org/publications/fund-reports/2022/jan/state-trends-employer-premiums-deductibles-2010-2020.

[11] Id. (Exhibit 3).

[12] See *Americans Are Signing Up for Obamacare in Record Numbers*, The New York Times (December 18, 2023), available at https://www.nytimes.com/2023/12/21/health/aca-obamacare-enrollment.html .

on legacy Pathway 1 AHPs, like the Trust, by simply repealing the 2018 AHP Rule without further action. If DOL is inclined to take further action, however, that should not be done in this rulemaking (consistent with the DOL's commitment in the preamble to solicit comments from stakeholders on whether any changes or further rulemaking are warranted), and should be reserved for a future rulemaking with an opportunity for the public to provide comment on any specific proposals.

Sincerely,

Kristofer T. Johnson
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