The following technical memorandum supplements ASAE's comments on the Department of Labor's proposed rule to expand Association Health Plans (AHPs).

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Re: Definition of Employer--Small Business Health Plans

This technical memorandum further discusses and expands upon the comments of the American Society of Association Executives ("ASAE") regarding the proposed regulation entitled "Definition of Employer--Small Business Health Plans" published in the Federal Register on January 5, 2018 (the "Proposed Rule").

This memorandum addresses four general areas of interest to our client:

(I) Differentiating between types of plan sponsors;

(II) Clarifying who is eligible to participate in an association health plan ("AHP");

(III) Suggesting revisions to the Proposed Rule that would minimize duplicative compliance costs; and

(IV) Proposing additional sub-regulatory actions that can be taken by the Department of Labor to supplement the impact of the Proposed Rule.

I. Not All Associations are Created Equal

Section 3(5) of the Employment Retirement Income Security Act of 1974 ("ERISA") refers to a "group or association of employers acting for an employer." Prior to the Proposed Rule, this concept was thought to entail the provision of benefits by a membership organization consisting of separate entities whose workforces have similar coverage needs and sufficient commonality of interest as to make "sham" health coverage mutually self-destructive. A clear example of this type of arrangement would be a trade association or a professional society that provided coverage as an ancillary benefit of membership to its constituency.

The Proposed Rule, however, would greatly expand the concept to include "*Ad hoc* AHPs" created for the primary purpose of providing health coverage. Because such AHPs would have no closer relationship to its participants than any other insurer, as a result, the proposed definition of "employer" now includes a number of substantive requirements intended to limit discrimination and prevent an actuarial death spiral. In the case of *Ad hoc* AHPs, these restrictions are critical. Yet, AHPs associated with nonprofit membership organizations ("Membership AHPs") will already be heavily regulated under the Internal Revenue Code (as well as, potentially, state laws governing not-for-profit corporations and charitable entities) and will have aligned interests with the organizations due-paying members.

As a result, we urge the Department to distinguish between *Ad hoc* AHPs and Membership AHPs. We note that this suggestion is not without precedent, as many fields

of law, including federal election law, defer to IRS or state regulation when it comes to nonprofits.

Proposal One- Define Membership AHP

As discussed above, because Membership AHPs are already subject to regulation, the final rule should provide that *Ad hoc* AHPs should be subject to a higher tier of DOL oversight. However, in order to prevent regulatory evasion, the Department should issue clear guidelines as to what constitutes a Membership AHP. Factors that might be considered relevant include oversight by an organization that is:

- Exempt from taxation under Code Sections 501(c)(3) or (6);
- Subject to oversight by state charities bureaus or attorneys general;
- In good standing for five years; and/or
- Able to show non-premium revenue or programming expenditures in excess of $5 million.

As an alternative approach, a Labor determination letter program could be implemented that would allow the Department to review individual plans to ensure that there are sufficient participant protections.

Proposal Two- Exempt Membership AHPs from Paragraph (d) of the Proposed Rule

Membership AHP should be able to tailor eligibility and coverage to industry-specific considerations even if there is an impact on the risk pool because professional societies and trade associations, unlike *Ad hoc* AHPs, have a natural constituency with common interests. Because coverage will be linked to membership in the parent organization, plans are limited in their ability to manipulate plan terms or marketing efforts to discriminate or otherwise manipulate the risk pool. Conversely, by exempting

Membership AHPs from paragraph (d), employers will be free to address industry-specific considerations without having to comply with one-size-fits-all protections. Accordingly, we urge the Department to exempt Membership AHPs from all or a portion of paragraph (d) of the Proposed Rule.

Proposal Three- Allow Membership AHPs to Work Closely with Insurers

To prevent regulated insurers from forming controlled AHPs in order to evade state regulation, the Proposed Rule restricts certain joint ventures between insurers and AHPs. However, for many of the same reasons that the Marketplace Reforms are relaxed for large group employers with sufficient leverage to negotiate at arm's length with insurers, Membership AHPs that are sufficiently sophisticated and independent should have additional flexibility to allocate risk and coordinate resources with traditional insurers, particularly if the organization does so as a fiduciary.

II. Expanding the Pool of Eligible Individuals

According to the preamble, one of the primary motivations behind the Proposed Rule is to allow similarly situated individuals to qualify for the same regulatory treatment as large employers. In fact, for the first time "owner only" plans can be treated as ERISA plans, and small group employers treated as large group employers. Although this will provide much relief to small employers, the Proposed Rule should apply to a greater variety of service providers.

Proposal Four- Clarify Whether Employees May Join Independent of Employer

The Proposed Rule treats partners as common-law employees of their own business, yet traditional employees are not entitled to similar "dual status treatement." "Working Owners" should include individuals engaged in the trade or business of

providing services as employees[1], so long as they satisfy the hour requirement and their common-law employer does not offer them other coverage. We propose an alternate definition of *Working Owner* that includes any individual:

> (i) Who has an ownership right of any nature in a trade or business, whether incorporated or unincorporated, including partners, individuals engaged in the trade or business of performing services as an employee, and other self-employed individuals; [and]
>
> (ii) Who is earning wages or self-employment income from the trade or business for providing personal services to the trade or business (including an employee receiving wages from an employer on account of a trade or business of providing services as an employee of such employer);
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> . . . .
>
> (iv) Who either:
>
> . . . .
>
> (B) Has earned income from such activities ~~trade or business~~ that at least equals the working owner's cost of coverage for participation by the working owner and any covered dependents in the ~~group~~ association health plan ~~sponsored by the group or association in which the individual is participating~~.

Proposal Five- Clarify that Nonprofits are Trade or Businesses

For various purposes, the Proposed Rule refers to a "trade or business." Although a broad classification, it presupposes that both the service recipient and the service provider have a profit motive. However, many working-founders of nonprofits and other service providers have noneconomic motives. The rule should clarify that any service provider, unless engaged solely in passive activities, may be covered by an AHP so long as it satisfies the commonality tests.

[1] IRC Sections 62 and 1402(c)(3).

III. Eliminating Administration Issues

The Proposed Rule technically allows small businesses to aggregate compliance costs. However, the practical effect will be limited because the Proposed Rule imposes administrative, recordkeeping, and procedural requirements on both the employer and the AHPs, while still requiring individual employers to maintain a separate welfare plan.

Proposal Six- Allow ERISA Obligations to Satisfy Control Requirements

The Proposed Rule does not provide clear guidance relating to how small employers and Working Owners may satisfy the control requirements. We suggest that this may be easily resolved by mirroring Code Section 501(c)(9) and finding that any AHP overseen by a named fiduciary (as defined in ERISA) is considered under the control of its participants, without regard to who selects the committee members.

IV. Ensuring Smooth Interstate Operations

The Proposed Rule expressly provides that AHPs will be considered MEWAs, and therefore subject to state regulation. Although conflict preemption still technically applies, under the current state of the law, each state may implement onerous, if not outright impossible-to-satisfy, limitations on in-state MEWA operations. However, the Department of Labor has been specifically granted the authority to strike a balance between each state's interest in ensuring that insurance (or insurance-like) benefits are able to be paid when they come due, with Congress' clearly expressed interest in ensuring that companies participating in interstate commerce are not subject to conflicting state demands. These powers include the ability to issue regulatory and subregulatory guidance, defend federal interests in court, and issue exemptive relief.

Proposal Seven- Find that AHPs are Literally Single Employer Plans

The Proposed Rule provides that, for purposes of satisfying the Employment Nexus Requirement and Marketplace Reforms, the AHP is the "employer" of the employees of its employer-members. However, the preamble to the Proposed Rule counterintuitively states that for purposes of determining whether a plan is a MEWA, each employer-member is considered a distinct employer.

Yet, if the AHP, or a nonprofit membership organization affiliated with it, were to be treated as "a group or association of employers acting for an employer," and therefore a single employer of all participants, the special rules pertaining to MEWAs would not apply, although states would retain the powers reserved to them under the Savings Clause. Although the preamble claims that doing so would conflict with legislative intent, nothing in the Congressional record reveals such an intent. Furthermore, there is nothing novel about treating a plan available to more than one employer as a single employer plan.

As a result, we suggest that the DOL use its interpretative power to determine that for purposes of both ERISA Sections 3(5) and (4), *employer* includes a group or association of employers acting for an employer. As a result, an AHP with an indirect employment connection between the participant and the sponsor, such as a Membership AHP, should constitute a single employer plan.

Proposal Eight- Treat AHPs as MEWAs with Multiple SEP Subscribers

The MEWA rules explicitly distinguish between a MEWA and any plans or programs that are funded or administered by participating, subscribing, or otherwise

using a MEWA.[2] As a result, even if the AHP itself were to be considered a MEWA, so long as each member-employer or Working Owner creates a separate arrangement and meets minimum filing requirements, it could may constitute a single employer plan that is at least a partially self-funded plan, limiting the ability for the host state to regulate each sub-arrangement. The AHP itself would serve as stop-loss protection for the sub-arrangement.

Although sub-regulatory guidance takes the position that state discretion to regulate stop-loss coverage is not limited by ERISA,[3] this is not supported by primary law and the DOL could rescind this policy and explicitly provide that because an AHP is subject to ERISA, the states are prohibited from treating the stop-loss protection provided by such as plan as a form of insurance.

Proposal Nine- Grant Exemptive and Interpretative Relief

The DOL has been granted, but largely not utilized, extensive power to shape interstate operations of MEWAs. Along with retaining the authority to determine insurance status,[4] the Secretary is authorized to determine, individually or by class, that any self-funded MEWAs will be treated as fully insured for purposes of the preemption analysis.[5] However, in the absence of affirmative DOL guidance, some states have applied definitions of "fully insured," "not inconsistent with ERISA," or "standards requiring the maintenance of specified levels of reserves" that are so broad as to effectively provide that federal law is trumped by any state law or regulation impacting MEWAs, even if the state has no intention of ensuring participant protection or plan

[2] ERISA Section 514(6)(C).
[3] DOL Tech. Rel. 2014-01 (Nov. 6, 2014).
[4] ERISA Section 514(b)(6)(D).
[5] ERISA Section 514(b)(6)(B).

solvency. As a result, states are permitted to impose "insurance regulation" with no other purpose than interfering with an employer's ability to operate across state lines and the federal government's efforts to minimize the impact of rising health coverage costs on interstate commerce.

In order to ensure that interstate employers are able to provide benefits to their entire workforce, the Department should:

- Deem certain Membership AHPs with sufficient reserves to be treated as fully insured plans and provide a method for AHPs to be certified;
- Replace the MEWA Enforcement Handbook with more extensive guidance regarding what types of state regulations *are reasonably related to solvency and funding requirements*, limiting the ability of states to insert poison pills into procedural protections;
- Propose a definition of "fully insured" that includes small employers with notional retained losses, prefunding obligations, or that are subscribed to a reliable payer; and
- Clarify that in light of 2009 amendments to the ERISA imposing health coverage and benefit obligations on employers, state laws that have the effect of making it logistically impossible for employers to offer health coverage to employees are *inconsistent with ERISA* and therefore preempted even in the case of a self-funded MEWA.