Charles N. Kahn III
President and CEO

February 20, 2024

The Honorable Lisa M. Gomez
Employee Benefits Security Administration
U.S. Department of Labor
Room N–5655
200 Constitution Ave. NW
Washington, DC 20210

Re: Proposed Rescission of AHP Final Rule (RIN 1210–AC16)

Dear Assistant Secretary Gomez:

The Federation of American Hospitals (FAH) is the national representative of more than 1,000 leading tax-paying hospitals and health systems throughout the United States. The FAH members provide patients and communities with access to high-quality, affordable care in both urban and rural areas across 46 states, plus Washington, DC, and Puerto Rico. Our members include teaching, acute, inpatient rehabilitation, behavioral health, and long-term care hospitals and provide a wide range of inpatient, ambulatory, post-acute, emergency, children's, and cancer services.

The FAH appreciates the opportunity to submit comments to the Department of Labor (DOL) regarding its proposed rule on the *Definition of "Employer"— Association Health Plans* (Proposed Rule) published in the Federal Register (88 *Fed. Reg.* 87,968) on December 20, 2023.

The FAH urges the Department of Labor to finalize its proposal to rescind the 2018 Association Health Plan (AHP) final rule (29 CFR §2510.3-5, 83 *Fed. Reg.* 28,912). This is consistent with our comment letter on the 2018 proposed rule, where we urged the Department to withdraw the 2018 proposed rule.[1]

Although the Department finalized the AHP rule in 2018, fortunately no AHPs are known to have been formed on that basis. In part, this is because the U.S. District Court for the District

[1] FAH, "Re: Definition of Employer under Section 3(5) of ERISA-Association Health Plans [EBSA-2018-0001; RIN 1210-AB85]," March 6, 2018, https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB85/00457.pdf.

of Columbia appropriately found the primary provisions of the rule "unlawful and must be set aside," characterizing the 2018 AHP rule as "clearly an end-run around the ACA."[2]

Under the 2018 AHP rule, the regulatory definition of "employer" under the *Employee Retirement Income Security Act of 1974* (ERISA) was expanded to include associations formed by employers with substantially loosened links to each other. For example, the expansion of the commonality standard would permit associations based solely on geography, which the court found "creates no meaningful limit on these associations."[3] The 2018 rule also would permit a working owner with no employees to join an association that is deemed the "employer" for purposes of an AHP and thus subject to health plan requirements for large employers, rather than the more comprehensive requirements for individual coverage as required under federal law. The court correctly noted that the 2018 rule's "attempt to bring sole proprietors with no employees into ERISA's fold stretches the statute too far" and is "absurd."[4]

Under federal law, coverage offered by large employers is exempt from a set of standards and consumer protections that insurance offered to small employers and individuals must otherwise meet. Specifically, by being considered a single large group, association-sponsored coverage could avoid important consumer protections including minimum benefit standards, annual and lifetime limits on cost sharing, rules that limit underwriting of premiums, single risk pool requirements, and participation in risk adjustment.

Associations could further take advantage of the looser restrictions by underwriting premiums offered to certain small employers to discourage enrollment of less appealing groups. For example, they could offer coverage only in geographic areas where they determine healthier individuals reside, and they could manipulate the health care benefits they offer in ways that make their coverage unappealing to individuals who need access to more comprehensive health care. This segmenting of risk would result in higher and increasing premiums for individuals left out of associations, which could spiral over time, ever worsening adverse selection that would destabilize the non-AHP products.

In short, the implementation of the final rule's policies would result in the following and therefore should be rescinded:

- Different rules for AHPs would destabilize health insurance markets.
- Access to comprehensive health coverage would decline, thus harming consumers, particularly those in most need of healthcare services.
- Growth would occur of multiple employer welfare arrangements (MEWAs), of which AHPs are generally a type and which have a long history of past abuse and failure.[5]

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[2] *New York v. United States Department of Labor*, 363 F. Supp. 3d 109 (D.D.C. 2019).

[3] *New York*, 363 F. Supp. 3d at 134.

[4] *New York*, 363 F. Supp. 3d at 137.

[5] See, for example, FAH, "Re: Definition of Employer under Section 3(5) of ERISA-Association Health Plans [EBSA-2018-0001; RIN 1210-AB85]," March 6, 2018, p. 5. Since 2018, DOL has taken civil and criminal enforcement action against 21 MEWAs to protect participants and beneficiaries from fraud or mismanagement of such arrangements. In the last five years, the Department has civilly recovered over $95 million from mismanaged or fraudulent MEWAs (88 *Fed. Reg.* 87,973).

It was for these reasons that the FAH originally opposed the 2018 AHP rule and supports the Department's current proposal to rescind it in its entirety.

The Department also sought comment on whether it should propose a rule that (1) codifies pre-rule guidance for group health plans (that is, the subregulatory guidance in place prior to the 2018 AHP Rule), (2) clarifies the application of the pre-rule guidance to group health plans (for example, the application to AHPs of nondiscrimination policies in *Health Insurance Portability and Accountability Act of 1996* (HIPAA)), and (3) offers revised alternative criteria for multiple employer association-based group health plans.

The FAH supports the Department's efforts to codify the longstanding guidance that had been in place prior to the 2018 AHP rule. Such codification would enhance the durability and enforceability of that guidance. The FAH would also support additional clarification and enhancements to ensure consumers are not underinsured, which has been a significant concern with AHPs and other MEWAs. To that end, the FAH restates its position from our 2018 comment letter: to ensure that AHPs are not engaged in discriminatory practices, they should be subject to the ACA's Essential Health Benefit requirements, rate reforms, guaranteed issue (which includes marketing standards), and single-risk pool requirements.[6]

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Thank you for the opportunity to comment on the proposed rule. If you have any questions, please contact me or a member of my staff at 202-624-1534.

Sincerely,

[6] FAH, "Re: Definition of Employer under Section 3(5) of ERISA-Association Health Plans [EBSA-2018-0001; RIN 1210-AB85]," March 6, 2018, p. 8.