COMMITTEE ON EDUCATION
AND THE WORKFORCE
U.S. HOUSE OF REPRESENTATIVES
2101 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6100

February 13, 2023

The Honorable Lisa M. Gomez
Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Dear Assistant Secretary Gomez:

We write in support of steps taken by the Employee Benefits Security Administration (EBSA) to reverse efforts by the Trump Administration to undermine the *Affordable Care Act* (ACA).[1] Specifically, we are pleased that the Fall 2022 Regulatory Agenda[2] includes a rulemaking to rescind the Final Rule entitled *Definition of "Employer" Under Section 3(5) of ERISA-Association Health Plans* (2018 Final Rule or Rule),[3] and we urge EBSA to promptly move forward with the rulemaking process. Further, we strongly encourage EBSA to thoroughly examine additional regulatory actions that are needed to protect consumers from health benefit arrangements that seek to evade important requirements of federal and state law.

[1] Pub. L. No. 111-148 (2010).
[2] United States Dep't of Lab., *Definition of "Employer" Under Section 3(5) of ERISA-Association Health Plans*, Unified Agenda of Regulatory and Deregulatory Actions, Fall 2022, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202210&RIN=1210-AC16.
[3] United States Dep't of Lab., *Final Rule: Definition of "Employer" Under Section 3(5) of ERISA-Association Health Plans*, 83 Fed. Reg. 28912 (June 21, 2018), https://www.federalregister.gov/documents/2018/06/21/2018-12992/definition-of-employer-under-section-35-of-erisa-association-health-plans. The core provisions of this rule were vacated while the remainder of the rule was remanded to the agency for further consideration. *See New York v. United States Dep't of Lab.*, 363 F. Supp. 3d 109, 141 (D.D.C. 2019).

On October 12, 2017, President Trump issued Executive Order 13813 (E.O. 13813) directing federal agencies to take steps to expand non-traditional forms of health coverage that do not comply with the core consumer protections of the ACA and other laws.[4] Pursuant to E.O. 13813, EBSA promulgated the 2018 Final Rule to expand the circumstances in which a group or association of employers may sponsor a single health plan known as an "association health plan" or "AHP."[5] By eliminating key guardrails under the *Employee Retirement Income Security Act* (ERISA)[6], the Rule dramatically expanded the circumstances in which AHPs could be offered as an ERISA-covered employee benefit—even to self-employed individuals without any common law employees.[7] Longstanding guidance from the agency had generally allowed for the formation of AHPs only to provide coverage on behalf of employers who have significant ties and shared interests with one another, consistent with the text and purpose of ERISA.[8]

In the preamble to the 2018 Final Rule, however, EBSA noted that newly formed AHPs would provide fewer benefits than ACA-compliant plans while raising costs in the small group and individual markets.[9] According to EBSA, AHPs could "use their regulatory flexibility to design more tailored, less comprehensive health coverage. . . [which] will necessarily lead to some favorable risk selection toward AHPs and adverse selection against individual and small group markets."[10] This would result in higher premiums for consumers enrolled in ACA-compliant small group and individual market plans.[11] As a result of these and other harmful impacts to consumers, the Rule generated widespread opposition with approximately 95 percent of comments received during the rulemaking process opposing or criticizing its approach.[12]

On March 28, 2019, in *State of New York v. United States Department of Labor*, a federal court vacated the core provisions of the 2018 Final Rule.[13] In striking down the core provisions of the Rule, Judge John D. Bates, an appointee of President George W. Bush, pointed to President Trump's E.O. 13813, which explicitly described AHPs as a tool to "avoid" the requirements of the ACA; Judge Bates stated that "the [2018] Final Rule is clearly an end-run around the

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[4] Executive Order on Promoting Healthcare Choice and Competition Across the United States (Oct. 17, 2017), 82 Fed. Reg. 48385, https://www.federalregister.gov/documents/2017/10/17/2017-22677/promoting-healthcare-choice-and-competition-across-the-united-states (E.O. 13813 of Oct 12, 2017, revoked by E.O. 14009 of Jan. 28, 2021).
[5] United States Dep't of Lab., *supra* note 3.
[6] Pub. L. No. 93–406 (1974).
[7] United States Dep't of Lab., *supra* note 3 at 28912 ("The final rule also sets out the criteria that would permit, solely for purposes of Title I of ERISA, certain working owners of an incorporated or unincorporated trade or business, including partners in a partnership, without any common law employees").
[8] *See, e.g.*, U.S. Dep't of Lab., Advisory Opinion 2008-07A (Sept. 26, 2008), https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2008-07a; U.S. Dep't of Lab., Advisory Opinion 96-25A (Oct. 31, 1996), https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/1996-25a.
[9] United States Dep't of Lab., *supra* note 3 at 28939.
[10] *Id*.
[11] *Id*.
[12] Noam Levey, Trump's New Insurance Rules Are Panned by Nearly Every Healthcare Group that Submitted Formal Comments, Los Angeles Times (May 30, 2018), https://www.latimes.com/politics/la-na-pol-trump-insurance-opposition-20180530-story.html.
[13] *New York v. United States Dep't of Lab*., 363 F. Supp. 3d 109, 141 (D.D.C. 2019).

ACA."[14] The judge rejected the Trump Administration's arguments, noting that allowing entities without employees to establish an "employer-sponsored" group health plan "does violence to ERISA."[15] Accordingly, the court vacated and remanded the remaining provisions of the Rule to the Department of Labor for reconsideration.[16] However, the 2018 Final Rule remains codified in the Code of Federal Regulations[17] and the Department has recently begun to consider taking needed steps to address the issue.[18]

We are concerned that the delay in rescinding the 2018 Final Rule has generated confusion among stakeholders while potentially encouraging the proliferation of other harmful arrangements that may be contrary to law. For example, Virginia recently enacted legislation[19] that allows self-employed realtors without common law employees to participate in an AHP, which appears inconsistent with the requirements of ERISA and jeopardizes the stability of the individual market risk pool.[20] In addition, the arguments previously made by EBSA under the Trump Administration to justify the 2018 Final Rule closely resemble arguments made by proponents of other troubling arrangements, notably data marketing partnerships that provide unregulated insurance to individuals while purporting to be ERISA-covered employee benefit plans.[21]

To resolve ambiguity and ensure consumers are fully protected, it is critical that EBSA promptly rescind the 2018 Final Rule as part of its upcoming rulemaking process. In addition, we encourage EBSA to undertake a thorough examination of additional ways to strengthen consumer protections applicable to the existing AHP market and to address new and emerging threats to consumers posed by other health plans that attempt to circumvent consumer protection laws.[22]

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[14] *Id*. at 117.
[15] *Id*.
[16] *Id*. at 141. Note that the ruling was appealed to the United States Court of Appeals for the District of Columbia Circuit but has been on hold since February 8, 2021, while "[t]he matter remains under consideration by the Department." Status Report at 1, *New York v. United States Dep't of Lab*., Case No. 19-5125 (D.C. Cir. Aug. 2022).
[17] 29 C.F.R. § 2510.3-5, https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XXV/subchapter-B/part-2510#2510.3-5.
[18] United States Dep't of Lab., *supra* note 2.
[19] HB 768/SB 335 (2022), https://lis.virginia.gov/cgi-bin/legp604.exe?221+ful+CHAP0349+SB 33pdf and https://lis.virginia.gov/cgi-bin/legp604.exe?221+ful+CHAP0349+pdf; *see also* § 38.2-3521.1 of the Code of Virginia.
[20] It is our understanding that your colleagues at the U.S. Department of Health and Human Services have notified state insurance regulators that the Virginia State law is not consistent with federal requirements, and the agency is considering next steps. *See* Letter from Chiquita Brooks-LaSure, U.S. Department of Health and Human Services to Scott White, Virginia Bureau of Insurance (Aug. 29, 2022).
[21] *See* Austin R. Ramsey, Data Health Plans 'Masquerade' as Employer Benefits: States Say, Bloomberg Law (Apr. 8, 2021), https://news.bloomberglaw.com/daily-labor-report/data-health-plans-masquerade-as-employer-benefits-states-say.
[22] *See, e.g.*, Christen Linke Young, Taking a Broader View of "Junk Insurance," Brookings Institution (July 6, 2020), https://www.brookings.edu/research/taking-a-broader-view-of-junk-insurance/; Leukemia & Lymphoma Society et al., *Under-Covered: How "Insurance-Like" Products Are Leaving Patients Exposed* (May 2021), https://www.lls.org/sites/default/files/National/undercovered_report.pdf.

Thank you in advance for your response. We look forward to continuing to collaborate with EBSA on this and other important issues as we work to advance our shared goal of protecting the hard-earned benefits of workers and their families. If you have any questions or you wish to discuss this matter further, please contact Daniel Foster at Daniel.Foster@mail.house.gov. Please direct all official correspondence and information relating to this request to the Committee's Clerk, Rasheedah Hasan, at Rasheedah.Hasan@mail.house.gov.

Sincerely,

ROBERT C. "BOBBY" SCOTT
Ranking Member

MARK DeSAULNIER
Ranking Member
Subcommittee on Health, Education, Labor, and, Pensions

cc: Amber Rivers, Director, Office of Health Plan Standards and Compliance Assistance