American Academy of Pediatrics
DEDICATED TO THE HEALTH OF ALL CHILDREN®

AAP Headquarters
345 Park Blvd
Itasca, IL 60143
Phone: 630/626-6000
Fax: 847/434-8000
E-mail: kidsdocs@aap.org
www.aap.org

Reply to
AAP Washington Office
601 13th St NW, Suite 400N
Washington, DC 20005
Phone: 202/347-8600
E-mail: kids1st@aap.org

March 6, 2018

R. Alexander Acosta
Secretary
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Attention: Definition of Employer—Small Business Health Plans RIN 1210-AB85

Dear Secretary Acosta:

On behalf of the American Academy of Pediatrics (AAP), a non-profit professional organization of 66,000 primary care pediatricians, pediatric medical subspecialists, and pediatric surgical specialists dedicated to the health, safety and well-being of infants, children, adolescents, and young adults, I submit comments on the Proposed Rule by Department of Labor (DOL) to amend the definition of "employer" under Title I of the Employee Retirement Income Security Act (ERISA) section 3(5). We read the Proposed Rule with great interest, as it will affect child beneficiaries of employees enrolled in Association Health Plans (AHPs). We believe that commercial coverage for children, whether through a large employer, a qualified health plan or an AHP, must ensure access to timely, affordable, high-quality and age-appropriate health care that meets their unique needs.

We share the Department's goal of increasing access to affordable health care coverage and offering greater choice to individuals and small businesses so long as coverage, benefits, and patient protections for children are not undermined. While we applaud provisions that seek to protect against discrimination based on health status, we believe the Proposed Rule could leave children, particularly children with serious, chronic, or complex medical needs, with less comprehensive coverage and higher out-of-pocket costs. Therefore, we respectfully urge DOL to consider the implications of the rule for the health and wellbeing of our nation's children and pregnant women before finalizing the proposed regulatory changes.

We look forward to working with you to find mutually agreeable solutions that strike the correct balance between affordability and comprehensiveness of coverage for children. Our specific comments are below.

Employer definition, Bona fide group or association of employers, and Commonality of Interest (§ 2510.3-5(a)-(c))

Sections 2510.3-5(a) to (c) of the Proposed Rule will increase the availability of AHPs accessible to individuals and businesses by broadening commonality of interest requirements, permitting employers to come together for the sole purpose of obtaining health coverage, and allowing working owners to join associations. These changes could significantly increase the number of children enrolled in AHPs as dependent beneficiaries.

Under current DOL guidance, many existing AHPs are treated as individual or small group coverage and therefore subject to important regulations under the Affordable Care Act (ACA) that protect the unique needs of children and families, including essential health benefit and actuarial value requirements. As articulated in the preamble, the Proposed Rule would treat many more AHPs as single large multiple employer plans, exempting them from many of these vital protections.

Children are not little adults; they require services and care specific to their unique development and medical needs. Children need a benefit package that ensures timely and affordable access to a comprehensive set of pediatric services, whether they are relatively healthy or have special health care needs. The expansion of AHPs has the potential to move children to cheaper, less comprehensive coverage. We fear this could erode access to important essential health benefits like vaccines, prescription drugs, mental health services, dental and vision services, and habilitative services. A gap in benefits can result in life-long health consequences that are both avoidable and costly. Pediatricians have reported that their experiences with AHPs include poor reimbursement and inadequate benefit packages that have harmed the ability of their patients to access affordable and comprehensive health coverage. The proposed rule contains insufficient protections against these patient harms and we urge that the rule be strengthened to address these concerns.

Additionally, we are concerned that increased enrollment in AHPs could lead to higher cost sharing for families of children with severe, chronic, or complex medical needs. Further, the changes proposed in this regulation could allow these plans to implement annual and lifetime caps on benefits that are no longer included as essential benefits. Increased cost sharing or benefit caps could put families of vulnerable children at serious financial risk.

Also included in the proposed regulation are new criteria to define the "commonality of interest", which would allow employers to come together to form an AHP if they share a common city, county, or metropolitan area. We urge the Department to work with state regulators to ensure that states have both the tools and the authority to conduct stringent oversight of AHP network design. Provider network design and oversight is critically important for children, especially those in need of pediatric specialty and subspecialty services, so that children are receiving timely, appropriate services for their unique health care needs. Inadequate and limited networks that do not include a range of appropriately trained pediatric specialists and subspecialists may result in care delays with poor medical outcomes that ultimately cost insurers and consumers more.

In addition, it is not uncommon for children to travel across state lines to get needed care from a pediatric provider with the requisite training and expertise due to the regional nature of pediatric specialty care. However, as proposed, AHPs could be formed by employers within a common city, county, or metropolitan area, which could result in provider networks with varying geographic boundaries. Absent specific standards that ensure a full range of in-network pediatric providers, families may not have access to an appropriately trained in-network specialist due to those geographic limits.

Children with severe, chronic, or complex medical needs could be subject to high out-of-pocket expenses if they are required to seek out-of-network care to meet their health needs. In the absence of federal standards for provider networks, some children and families could find themselves unable to access the care they need despite having health coverage.

Nondiscrimination (§ 2510.3-5(d))

We applaud the Department's inclusion of nondiscrimination provisions in the proposed rule. However, we believe the nondiscrimination provisions in the rule must be strengthened to ensure that children and their families are protected against adverse risk selection and cherry-picking. In particular, we believe it is

necessary to prohibit AHPs from discrimination that can occur due to limited benefit designs, limited drug formularies and narrow provider networks. We believe that the proposed rule opens the door to health plan benefit and provider network design that can serve as disincentives for individuals with significant health conditions to enroll in those health plans. For example, issuers could exclude certain pediatric specialty providers from their networks and, in so doing, steer parents of a child with special health care needs away from their plan. As a result of this discriminatory network design, the issuer can avoid risk and lower premium costs because it does not enroll individuals with significant health care needs.

We also are concerned about the impact of AHPs with limited benefit packages and networks on children and families that seek coverage through ACA-compliant plans inside or outside of the Marketplaces. As the Department notes in the rule's regulatory impact analysis, the expansion of AHPs that offer lower-cost, less-comprehensive coverage would be most attractive to healthier individuals, thereby drawing them out of the traditional market. The segmented market will result in increased premiums for the more comprehensive non-AHP, ACA-compliant plans that more appropriately cover the services and include the providers that children need. Unfortunately, the nondiscrimination provisions of the proposed rule would not protect children and families from these discriminatory practices.

Oversight of AHPs

In the past, AHPs have at times been associated with fraud, abuse, and insolvency, leaving children and their families with unpaid benefits and bills.[1] While the Proposed Rule offers criteria intended to prevent abuse by ensuring bona fide employment-based associations, the relaxed restrictions afforded to AHPs open the door for potential abuse.

As noted in the regulatory impact analysis, self-insured AHPs have been particularly vulnerable to mismanagement, abuse, and evasion of state regulation and require specific attention. Therefore, we also seek clarification that state requirements for AHPs, including laws and regulations that prohibit their establishment in the state, will not be superseded in any way by federal regulations or guidance. We respectfully remind DOL that several states currently have laws and regulations in place that either prohibit the establishment of AHPs outright or place strict limits on them.

In conclusion, the AAP appreciates this opportunity to submit a comment on this Proposed Rule. We look forward to working with you to ensure that the unique health care needs of children are met in any health insurance product or program. If you have any questions, please do not hesitate to contact Marielle Kress in our Washington, D.C. office at 202/347-8600 or mkress@aap.org.

Sincerely,

Colleen A. Kraft, FAAP
President

[1] Kofman, M. Association Health Plan: Loss of State Oversight means Regulatory Vacuum and More Fraud. Georgetown University Health Policy Institute. 2015. Available at: https://hpi.georgetown.edu/ahp.html