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Department of Health and Human Services
Centers for Medicare & Medicaid Services
Attention: CMS–9928–NC
P.O. Box 8016,
Baltimore, MD 21244–8016

RE: Reducing Regulatory Burdens Imposed by the Patient Protection and Affordable Care Act & Improving Healthcare Choices To Empower Patients (RIN 0938-ZB39)

HR Policy Association (“HR Policy” or “the Association”) welcomes the opportunity to provide comments to the Department of Health and Human Services (HHS), Centers for Medicare & Medicaid Services (CMS) regarding its request for information on implementing President Trump’s Executive Order 13765 that was published the Federal Register on June 12, 2017.1

HR Policy is the lead organization representing chief human resource officers of over 385 of the largest corporations doing business in the United States. The member companies provide health care coverage to over 21 million employees and dependents, and collectively spend more than $76 billion annually on health care in the United States.

As you proceed with implementing Executive Order 13765, please consider these two important policy pillars for enhancing the affordability of employer-provided health care benefits:

- The Employee Retirement Income Security Act (ERISA) and its role in enabling employers to offer uniform health care benefits to employees no matter where they live, work or receive medical care is crucial. Strengthening ERISA preemption is needed to protect continued access to affordable coverage for millions of American families. We strongly urge HHS and CMS to do everything they can to protect ERISA preemption as they implement state waivers.

- Enabling flexibility and innovations in employer-provided health benefits reduces health care spending. Employers are adopting new strategies that are improving the delivery of health care, driving value-based payment reforms, helping employees maintain their health, and empowering employees and their families with more tools to help them avoid and manage chronic illnesses. We strongly urge HHS and CMS to every effort they can to minimize the unwarranted regulatory burdens of the Affordable Care Act (ACA) on all employers, large and small.

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1 82 Fed. Reg. 26885.
As you know, the ACA provides substantial regulatory authority to HHS, the Department of Labor (DOL), and the Treasury Department (Treasury), to interpret and administer the law. As you prepare your health care regulatory reform plan under Executive Order 13765, HR Policy strongly urges HHS to consider the following regulatory reforms.

- Protect and strengthen ERISA as HHS takes steps to increase state flexibility. HHS and CMS should not adopt or amplify the ACA’s indifferent approach to ERISA preemption in the interest of state flexibility and innovation. Health care reform should clearly and explicitly prohibit regulatory, reporting, and administrative burdens on ERISA plans, including those burdens related to State taxes and fees.

- Increase Transparency. The Census Bureau makes Public Use Microdata Sample (PUMS) files available to the public with appropriate privacy safeguards. There is no reason Medicare couldn’t release similar public files on the program’s claims data.

- Work with DOL and Treasury to reduce all reporting burdens required by the ACA by allowing employers to certify compliance to the greatest extent possible;

- Work with DOL and Treasury to reverse the unwarranted “embedded” individual out-of-pocket limit in employer-provided family health care plans. The “embedded” individual out-of-pocket limit in family health care plans is fundamentally at odds with the plain language of the ACA, the Public Health Service Act, and the Internal Revenue Service Code, as well as the regulatory text implementing those statutes. The Association strongly urges the Departments to immediately withdraw its sub-regulatory guidance;

- Work with DOL and Treasury to reverse the unwarranted essential health benefit/minimum value requirements on self-insured employers. Prior to 2015, HHS to the position that under the ACA employer sponsored self-insured and insured large group plans were not required to provide any of the 10 essential health benefits. However, in February 2015, HHS published a final rule stating that while self-insured employers “continue to have flexibility in designing their plans,” and “they are not required to cover all essential health EHB,” employer plans that fail to provide “substantial” coverage for in-patient hospitalization services or physician services (or both) do not meet the ACA’s minimum value standard. Moreover, this change was made without citing any statutory text to support this new employer mandate, HHS noted the ACA’s minimum value standard may be “interpreted” to require employers cover “critical benefits,” and HHS has not defined what it means by “substantial coverage.”

- Limit the ACA’s open-ended preventive services mandate that provides little or no implementation guidance to employers and reduces consumerism. Although HHS has taken the position that employers must cover all new U.S. Preventive Services Task Force (USPSTF) recommendations with an ‘A’ or ‘B’ rating, a careful legal reading of the ACA suggests employers are only required to cover the recommendations in place
when the ACA was enacted, and no more. Moreover, because USPSTF makes clinical treatment recommendations for health care providers the recommendations do not necessarily specify the frequency, method, treatment, or the setting for the provision of services that employers need in order to incorporate the recommendations into their plan designs;

- Work with DOL to reduce unnecessarily burdensome requirements on employers’ internal and external claims appeal processes;
- Work with DOL and Treasury to eliminate any unnecessary regulatory limitations placed on use of HSA’s, FSA’s and HRA’s;
- Work with DOL and Treasury to enable employers to make opt-out payments to employees who decline enrollment in an employer's group health plan; and
- Work with DOL to simplify the non-discrimination rule and strike the provisions not required by law, especially the language requirements.

As health care reform moves forward, federal policies should leverage and encourage the innovation of employer-sponsored health care benefits and support the flexibility necessary to enable employers to continue to make these innovations. Such policies will be critical for making the Nation’s workforce healthier and more productive.

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We appreciate the opportunity to comment on your request for information. Please let me know if HR Policy can be of any further assistance.

Sincerely,

Mark Wilson
Vice President, Health & Employment Policy
HR Policy Association