AMENDMENT TO
RULES COMM. PRINT 117–17
OFFERED BY MR. BURGESS OF TEXAS

Strike section 137301 and insert the following:

SEC. 137301. DEFINITION OF "EMPLOYER" UNDER ERISA
WITH RESPECT TO GROUP HEALTH PLANS.

(a) DEFINITION OF EMPLOYER.—Section 3(5) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(5)) is amended by striking the period and inserting "(which, with respect to a group health plan, shall be determined in accordance with criteria that includes the criteria under section 735).”.

(b) GROUP HEALTH PLANS.—Part 7 of subtitle B of title I of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1181 et seq.) is amended by adding at the end the following:

"SEC. 735. DEFINITION OF 'EMPLOYER' WITH RESPECT TO GROUP HEALTH PLANS.

"(a) IN GENERAL.—A group or association of employers that meets the criteria under subsection (b) shall be considered an employer under section 3(5) for purposes of sponsoring a group health plan."
“(b) REQUIREMENTS.—The requirements under this subsection are each of the following:

“(1) The primary purpose of the group or association may be to offer and provide health coverage to its employer members and their employees, if such group or association has at least 1 substantial business purpose, as described in subsection (c), unrelated to offering and providing health coverage or other employee benefits to its employer members and their employees.

“(2) Each employer member of the group or association participating in the group health plan is a person acting directly as an employer of at least 1 employee who is a participant covered under the plan.

“(3) The group or association has—

“(A) a formal organizational structure with a governing body; and

“(B) by-laws or other similar indications of formality.

“(4) The functions and activities of the group or association shall be controlled by the employer members of the group or association, and the employer members of the group or association that participate in the group health plan shall control the
plan. Control under this paragraph shall be in form and substance.

“(5) The employer members shall have a commonality of interest as described in subsection (d).

“(6)(A) The group or association shall not make health coverage through the group health plan available other than to—

“(i) an employee of a current employer member of the group or association;

“(ii) a former employee of a current employer member of the group or association who became eligible for coverage under the group health plan when the former employee was an employee of the employer; and

“(iii) a beneficiary of an individual described in clause (i) or (ii), such as a spouse or dependent child.

“(B) Notwithstanding subparagraph (A), the group or association shall not make health coverage through the group health plan available to any individual (or beneficiaries of the individual) for any plan year following the plan year in which the plan determines pursuant to reasonable monitoring procedures described in subsection (f)(2)(C) that the individual ceases to meet the conditions described in
subsection (f)(2) for being a working owner (unless the individual again meets those conditions), except as may be required by section 601.

“(7) The group or association, and any health coverage offered by the group or association, shall comply with the nondiscrimination provisions under subsection (e).

“(8) The group or association shall not be a health insurance issuer, or owned or controlled by such a health insurance issuer or by a subsidiary or affiliate of such a health insurance issuer, other than to the extent such entities participate in the group or association in their capacity as employer members of the group or association.

“(c) SUBSTANTIAL BUSINESS PURPOSE.—

“(1) IN GENERAL.—For purposes of subsection (b)(1), a substantial business purpose shall exist if the group or association would be a viable entity in the absence of sponsoring an employee benefit plan.

“(2) BUSINESS PURPOSE.—For purposes of subsection (b)(1) and paragraph (1), a business purpose shall—

“(A) include promoting common business interests of the members of the group or asso-
ciation or the common economic interests in a
given trade or employer community; and

“(B) not be required to be a for-profit ac-
tivity.

“(d) COMMONALITY OF INTEREST.—

“(1) IN GENERAL.—Subject to paragraph (3),
employer members of the group or association shall
be treated as having a commonality of interest for
purposes of subsection (b)(5) if—

“(A) the employers are in the same trade,
industry, line of business, or profession; or

“(B) each employer has a principal place
of business in the same region that does not ex-
cceed the boundaries of a single State or a met-
ropolitan area (even if the metropolitan area in-
cludes more than 1 State).

“(2) SAME TRADE, INDUSTRY, OR LINE OF
BUSINESS.—In the case of a group or association
that is sponsoring a group health plan under this
section and that is itself an employer member of the
group or association, the group or association shall
be deemed for purposes of paragraph (1)(A) to be
in the same trade, industry, line of business, or pro-
fession, as applicable, as the other employer mem-
bers of the group or association.
“(3) NONDISCRIMINATION.—The standards under paragraph (1) shall not be implemented in a manner that is subterfuge for discrimination as is prohibited under subsection (e).

“(e) NONDISCRIMINATION.—

“(1) IN GENERAL.—A group or association of employers sponsoring a group health plan under this section, and any health coverage sponsored by such group or association, shall comply with each of the following:

“(A) The group or association shall not condition employer membership in the group or association on any health factor of any individual who is or may become eligible to participate in the group health plan sponsored by the group or association.

“(B) The group health plan sponsored by the group or association shall comply with the rules under section 2590.702(b) of title 29, Code of Federal Regulations (as in effect on June 21, 2018), with respect to nondiscrimination in rules for eligibility for benefits, subject to subparagraph (D).

“(C) The group health plan sponsored by the group or association shall comply with the
rules under section 2590.702(c) of title 29, Code of Federal Regulations (as in effect on June 21, 2018), with respect to nondiscrimina-
tion in premiums or contributions required by any participant or beneficiary for coverage under the plan, subject to subparagraph (D).

“(D) In applying subparagraphs (B) and (C), the group or association may not treat the employees of different employer members of the group or association as distinct groups of similarly-situated individuals based on a health factor of 1 or more individuals.

“(2) Definition of health factor.—For purposes of this subsection, the term ‘health factor’ has the meaning given such term in section 2590.702(a) of title 29, Code of Federal Regulations (as in effect on June 21, 2018).

“(f) Dual treatment of working owners as employers and employees.—

“(1) In general.—A person determined in accordance with paragraph (2) to be a working owner of a trade or business may qualify as both an employer and as an employee of the trade or business for purposes of the requirements under subsection
(b), including the requirements under paragraphs (2) and (6) of such subsection.

“(2) WORKING OWNER.—

“(A) ELIGIBILITY.—A person shall qualify as a ‘working owner’ if a responsible fiduciary of the group health plan reasonably determines that the person—

“(i) does not have any common law employees;

“(ii) has an ownership right of any nature in a trade or business, whether incorporated or unincorporated, including a partner and other self-employed individual;

“(iii) is earning wages or self-employment income from the trade or business for providing personal services to the trade or business; and

“(iv) either—

“(I) works on average at least 20 hours per week, or at least 80 hours per month, providing personal services to the person’s trade or business; or

“(II) has wages or self-employment income from such trade or business that at least equals the person’s
cost of coverage for participation by
the person, and any covered benefi-
ciaries, in the group health plan
-sponsored by the group or association
in which the person is participating.

“(B) DETERMINATION.—The determina-
tion under subparagraph (A) shall be made
when the person first becomes eligible for cov-
erage under the group health plan.

“(C) REASONABLE MONITORING PROCE-
dURES.—A responsible fiduciary of the group
health plan shall, through reasonable moni-
toring procedures, periodically confirm the con-
tinued eligibility of a person to qualify as a
working owner under subparagraph (A) for pur-
poses of meeting the requirements under sub-
section (b) for the group health plan sponsored
under this section.

“(g) APPLICABILITY.—

“(1) FULLY INSURED.—This section shall apply
beginning on September 1, 2018, with respect to a
group or association of employers sponsoring a
group health plan that is fully insured.

“(2) PLANS EXPANDING TO INCLUDE BROADER
GROUP.—This section shall apply beginning on Jan-
January 1, 2019, with respect to a group or association of employers sponsoring a group health plan that—

“(A) is not fully insured;

“(B) is in existence on June 21, 2018;

“(C) meets the requirements that applied with respect to such plan before June 21, 2018; and

“(D) chooses to be a plan sponsored under this section (and subject to the requirements under subsections (b) through (f)).

“(3) Other Association Health Plans.—

This section shall apply beginning on April 1, 2019, with respect to any other group or association of employers sponsoring a group health plan.

“(4) Other Criteria in Advisory Opinions.—The criteria under this section shall not invalidate any criteria provided in an advisory opinion, in effect on or after the date of enactment of the Association Health Plans Act of 2021, that the Secretary may use to determine if a group or association of employers is an employer under section 3(5) for purposes of sponsoring a group health plan.

“(h) Determination of Employer or Joint Employer Status.—
“(1) IN GENERAL.—Participating in or facilitating a group health plan sponsored by a bona fide group or association of employers pursuant to subsection (a) shall not be construed as establishing an employer or joint employer relationship under any Federal or State law.

“(2) APPLICATION OF PROVISION.—Paragraph (1) shall apply to a group health plan sponsored or facilitated by a franchisor and any franchisee, by multiple franchisors for the benefit of the employees of such franchisors and their franchisees, by multiple franchisees for the benefit of the employees of such franchisees, by a franchisor whose franchisee or franchisees participate or participates in the plan, or by a person or entity that contracts with any individual as an independent contractor for whom the plan benefits.

“(i) RULE OF CONSTRUCTION.—Nothing in this section shall be construed as repealing or otherwise limiting the application of this Act (including section 712 relating to mental health parity) to group health plans and employee welfare benefit plans.”.