February 27, 2018

U.S. Department of Labor
200 Constitution Avenue NW
Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
Washington, DC 20210

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

To Whom It May Concern:

Thank you for the opportunity to comment on U.S. Department of Labor's (DOL) proposed regulation ("Proposed Rule" - RIN 1210-AB85) under Title I of the Employee Retirement Income Security Act (ERISA) that would broaden the criteria under ERISA section 3(5) for determining when employers may join together to form Association Health Plans (AHP).

I have been involved as a Trustee over an AHP in the State of Washington for the last several years and have thirty years of experience as a health plan executive. In these roles, have become personally apprised of the value that AHPs can offer members of a sponsoring association.

The proposed rule EBSA-2018-0001 contains several provisions that would be problematic in accomplishing the goal of AHP expansion.

Expansion of the HIPAA Nondiscrimination Rules

The Proposed Rule makes explicit that coverage offered through AHPs may not violate the HIPAA nondiscrimination rules and expands those rules to prohibit AHPs from treating employees of different member employers as distinct groups of similarly-situated individuals. One effect of this would be to prevent an AHP from charging higher premiums to an employer based on the on its aggregate claims experience.

The proposed expansion of the HIPAA nondiscrimination rules is inconsistent with the express language of HIPAA, as well as its policy and legislative history. On its face, interpreting "similarly-situated individuals" to include individuals hired by two different employers is not a permissible, reasonable or rational construction of the statutory language. There is no better example of employees who are not similarly-situated than the employees of two different employers. Such employees are hired by different employers to do different jobs at different sites subject to different terms and conditions and compensated and provided distinct benefits. They are not "similarly-situated individuals" simply because their employers share a trade or geographic area of operation that establishes an association or group of such employers as an ERISA 3(5) "employer" for the purposes of providing an employee benefit plan.

The Department states that treating the employees of separate employers as similarly-situated individuals is consistent with treating the association or group of employers as an ERISA 3(5) "employer." This is not true and suggests potentially dangerous unintended expansion of the nondiscrimination rules. Under current law,

controlled groups of corporations – which are treated as ERISA 3(5) "employers" – routinely have different premiums for different corporations within the controlled groups. This does not violate HIPAA and is closely analogous to the operation of an AHP. Even individuals working at separate divisions, or different locations within a division, within a single corporate entity are not treated as similarly-situated individuals under current law. Unless the Department's intent is to radically reshape the application of the HIPAA nondiscrimination rules, there is no reason to try to make the nondiscrimination rules apply to AHPs in a different manner than they apply to other entities.

HIPAA expressly states that the premium nondiscrimination rules shall not be construed "to restrict the amount an employer may be charged for coverage under a group health plan[.]"[1] The Proposed Rule thwarts this express policy statement by limiting the ability of AHPs to charge different rates to different member employers. And the Proposed Rule does this in the most insidious way: by forcing participating employers to cross-subsidize the risk of other employers (likely destabilizing the entire AHP market). The legislative intent of HIPAA is consistent with its express policy statement: "It does not restrict the amount that an employer may be charged for coverage under a group health plan."[2] But the Department has done this in its Proposed Rule.

Finally, the Department states that its intent in expanding the HIPAA nondiscrimination rules is to address risk selection, but it appears to misunderstand that risk selection is already addressed by federal and state law. With respect to insured plans, risk selection is addressed by the ACA and state insurance laws. Insurance carriers are limited with respect to the risk factors they can use to establish premiums and their rates are filed with the state in which they operate according to that state's rules. Consistent with the ACA, AHPs simply allow groups of employer's access to insurance rated plans under large group rating rules. There is no risk selection that is not already present in the large group market. Similarly, self-funded AHPs are regulated as MEWAs at both the state and federal level. To the extent that individual states believe that current state law does not adequately address risk selection that is the appropriate place to regulate it (though it is hard to imagine any state encouraging self-funded MEWAs to take on additional risk).

Precluding AHPs from continuing to use claims experience to set rates at the employer group level will inherently result in cross-subsidization and discourage the use and expansion of AHPs. The result would be that many employers' rates would increase simply as a result of one or two high-cost employers within the AHP. It creates risk adverse selection, cripples the expansion of AHPs, and will work against the goal of providing affordability through AHPs. Precluding AHPs from rate-setting at the employer group level in order to distinguish AHPs from commercial insurance is like asking credit unions to distinguish themselves from commercial banks by not checking a company's credit-worthiness when issuing a loan. It is simply untenable.

The Department's goal of distinguishing AHPs from commercial insurance is laudable, but it is not achieved through expanding the HIPAA nondiscrimination rules. The appropriate way to distinguish AHPs from commercial insurance is through the provisions relating to establishment and control of the AHP.

Require Sponsoring Associations to Exist for Non-Insurance Purposes

The Department should require sponsoring associations of AHP to be organizations that exist for purposes other than simply providing health insurance. As a Trustee, I have seen first-hand how impactful AHPs can be when

[1] ERISA 702(b)(2)(A)

[2] H.R. Rep. No. 104-736, at 187 (1996) (Conf. Rep.)

they are responsive to their members' needs. As such, AHPs should only be able to be formed by existing associations that have a membership base.

In the past, there has been fraud and abuse within AHPs that were created solely for the purpose of selling insurance. These organizations did not have a membership which they served. The Proposed Rule recommends some measures that may help prevent such fraudulent activity by a newly formed AHP; however, I am concerned that allowing creation of AHPs without a clear connection to an existing membership association could lead to abuse.

Existing membership associations have are controlled by their members and have long-established relationships to their communities. Membership associations offer benefits to their membership that go beyond health insurance. The Proposed Rule should be amended to include specifications around what constitutes a sponsoring organization. At a minimum, the following should be required:

(1) Organization has been operating for more than five years;

(2) Organization has a federal tax exemption as a non-profit organization; and,

(3) Organization is comprised of members who share a commonality such as industry or geographic region.

Grandfather Existing AHPs

The proposed rule will have a significant impact on existing AHPs. In order to minimize the Proposed Rule's impact on existing AHPs, the Department should modify the nondiscrimination requirement to permit current AHPs to continue operating as they have. Specifically, DOL should adopt a grandfathering rule pursuant to which fully-insured AHPs in existence prior to January 5, 2018 (publication date of the Proposed Rule) would be subject to the nondiscrimination requirements in section 2510.3-5(d) without regard to paragraph (d)(4). Grandfathered AHPs do not implicate the concerns that the Department has raised about risk selection because such AHPs have operated to enhance healthcare marketplaces prior to the issuance of the Proposed Rule. This modification would permit grandfathered AHPs to continue their current practice of experience rating each employer member, while balancing the Department's concerns about risk selection.

Preserving State Regulation

The Proposed Rule fails to specify which state laws can still be enforced, including for example, laws relating to rating practices or qualifications of AHP sponsoring entities. Historically, state insurance regulators have had the authority to review and approve insurance products offered to residents and businesses in their states. It is essential that the Proposed Rule expressly states that each state maintains the ability to protect their health insurance purchasers by regulating the insurance market within the state.

State regulators are best positioned to understand their specific local market dynamics and market players, enabling them to more quickly identify and address necessary consumer protections. Each state's regulators need to be able to set rating rules as well as determine if products that go across state lines. The Proposed Rule should make explicit that all AHPs must comply with the state law in which coverage is provided.

Effective Date

The effective date of the Proposed Rule needs to be no sooner than plan years commencing on or after January 1, 2020 to allow enough time for insurance companies to react and adjust without causing unnecessary price increases for small and medium sized employers.

Association Health Plans can be a vehicle to expand quality and affordability of health care coverage as they have been in the State of Washington. However, the proposed rule would prevent this expansion from occurring and would lead to increased risk of fraud and abuse; lower quality benefits; adverse selection and ultimate deterioration of overall insurance markets.

Thank you again for the opportunity to comment. Please do not hesitate to contact me with any questions at 206.389.7200.

Sincerely,

Mary McWilliams