



March 6, 2018

Jeanne Klinefelter Wilson
Deputy Assistant Secretary
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

RE: Definition of Employer—Small Business Health Plans (RIN 1210-AB8)

Dear Deputy Assistant Secretary Wilson:

The American College of Physicians appreciates the opportunity to submit comments regarding the Definition of Employer Under Section 3(5) of ERISA-Association Health Plans Proposed Rule. The American College of Physicians is the largest medical specialty organization and the second largest physician group in the United States, representing 152,000 internal medicine physicians (internists), related subspecialists, and medical students. Internal medicine physicians are specialists who apply scientific knowledge and clinical expertise to the diagnosis, treatment, and compassionate care of adults across the spectrum from health to complex illness.

ACP policy supports providing small businesses with the group purchasing advantages enjoyed by larger companies, provided that such “pooling” arrangements:

- Do not weaken existing federal and state consumer protection safeguards including, but not limited to, state regulations regarding fiscal soundness, prompt payment, and consumer grievance and appeals rights.
- Protect enrollees against under-insurance by requiring or creating incentives for health plans offered under the pooling arrangement to provide a package of essential benefits, including coverage for preventive and primary care services.

Under the Affordable Care Act, small group and individual market plans must provide an essential health benefits package; abide by rating rules that prohibit varying premiums based on health status, age, and other factors; and meet medical loss ratio requirements; among other requirements. Small businesses can purchase insurance for employees through the Small Business Health Options Program and some employers may be eligible for tax subsidies to reduce premiums. As noted in the proposed rule, AHPs must currently abide by individual and small group market regulations established in the ACA unless they are considered a single multiple-employer plan regulated under the Employee Retirement Income Security Act.

The proposed rule seeks to foster the organization and growth of AHPs by allowing employer associations to exist solely to offer health insurance and permitting working business owners and their dependents to join AHPs. The proposed rule would also allow employers to join associations if they are in the same trade, industry, line of business, or profession regardless of geographic distribution **or** if they have a “principal place of business within a region that does not exceed the boundaries of the same State or the same metropolitan area (even if the metropolitan area includes more than one State).”

In practice the proposal would allow small businesses and the self-employed to join health plans governed by large group market rules, circumventing the individual and small group health insurance market regulations established by the ACA. The proposed rule predicts that AHPs may achieve lower costs through administrative efficiencies from economies of scale, self-insurance and market power. However, cost-savings would likely result from the availability of less comprehensive coverage with fewer benefits and loose rating restrictions that favor healthy individuals.

The College is concerned that the proposed rule will destabilize the individual and small group markets through which millions of people purchase comprehensive health coverage. Similar employer pooling approaches, including self-funded multi-employer welfare arrangements (MEWA), have been shown to attract a healthier pool of enrollees. Montana MEWA’s have led to market segmentation and higher premium rates in the fully-insured small group market (1). Reflecting ACP policy, the American Academy of Actuaries (AAA) recommends that AHPs must be subject to the same state consumer protection laws and insurance regulations as individual and small group plans to avoid adverse selection (2). If the AHP is exempt from insurance rules, such as the benefit mandates or the rating regulations, non-AHP small group and individual market plans could be vulnerable to adverse selection problems resulting in higher premiums and less stability.

Firms that remain in the small group market, likely those with a sicker employee population, would see premiums increase and choice of affordable insurance options dwindle. The proposed rule maintains that AHPs would be barred from discriminating based on health status, but even if effectively enforced, AHPs could potentially vary premiums based on age, gender, industry and occupation, geographic area and other factors. **Further, AHPs may create benefit packages that discourage enrollment of people with complex care needs by not including mental health and substance use disorder treatment or maternity services among covered benefits.** The proposed rule says that the ACA’s individual mandate will reduce potential susceptibilities of the individual and small group health insurance markets to adverse selection. However, the recent tax law reduces to zero dollars the financial penalty for not having insurance starting in 2019, eliminating an important bulwark against adverse selection and high premiums.

AHPs have an unfortunate legacy of fraud and insolvency (3,4) that was rectified with passage of the ACA and subsequent regulations. Some reports question the long-term viability of AHPs because participation among small employers fluctuates (1). The proposal may trigger confusion among regulators, especially when it is unclear whether the AHP is subject to state insurance regulations (5). According to the AAA, AHPs that aren’t subject to clear regulatory oversight are at higher risk of insolvency, often lacking the necessary financial reserves to cover health care spending. The consumer representatives of the NAIC have noted that while the proposed rule maintains that states would continue to apply reserve standards and other financial requirements for emerging AHPs, plans could claim that they are under the authority of ERISA rather than state laws, leading to oversight gaps, litigation, and confusion (6). If AHPs can’t pay the medical claims of their enrollees, patients, physicians and other health care professionals will be burdened with the cost.

ACP urges the Department to maintain appropriate federal (including those of the ACA) and state consumer protections, benefit mandates, provider network adequacy requirements, and rating rules to ensure that AHPs are comprehensive, financial viable and do not erode the existing individual and small group insurance markets on which millions rely. Please contact Ryan Crowley, Senior Associate for Health Policy at rcrowley@acponline.org if you have any questions.

Sincerely,



Jack Ende MD, MACP
President
American College of Physicians

¹ Corlette S, Hoadley J, Lucia K, Palanker D. Small Business Health Insurance and the ACA: Views from the Market 2017. Urban Institute, July 2017.

https://www.urban.org/sites/default/files/publication/92291/2001459_small_business_health_insurance_and_the_aca_views_from_the_market_2017_0.pdf

² American Academy of Actuaries. Association Health Plans Issue Brief. February 2017. Accessed at http://www.actuary.org/files/publications/AssociationHealthPlans_021317.pdf

³ Lucia K and Corlette S. Association Health Plans: Maintaining State Authority is Critical to Avoid Fraud, Insolvency, and Market Instability. The Commonwealth Fund. January 24, 2018. Accessed at <http://www.commonwealthfund.org/publications/blog/2018/jan/association-health-plans-state-authority>

⁴ Kofman M, Lucia K, Bangit E, Pollitz K. Association Health Plans: What's All the Fuss About? *Health Aff.* 2006;25(6):<https://doi.org/10.1377/hlthaff.25.6.1591>

⁵ U.S. General Accounting Office. Employer Association Health Plans. GAO/HEHS-96-59R. December 6, 1995. Accessed at <https://www.gao.gov/assets/90/85191.pdf>

⁶ NAIC Consumer Representatives. Concerns about the Federal Proposed Rules Related to Association Health Plans. February 1, 2018. Accessed at http://uphelp.org/sites/default/files/attachments/naic_rep_letter_ahps_020118_final_0.pdf