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Office of Regulations and Interpretations
Employee Benefits Security Administration
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RE: Definition of "Employer" under Section 3(5) of ERISA – Association Health Plans, RIN 1210-AB85

To Whom It May Concern:

Cigna welcomes the opportunity to respond to the Notice of Proposed Rulemaking, "Definition of "Employer" under Section 3(5) of ERISA – Association Health Plans" ("NPRM" or "proposed rule"). We appreciate the efforts of the Department of Labor ("DOL" or "Department"), stemming from Executive Order 13813, to expand employer and employee access to more affordable, high-quality coverage.

Cigna Corporation, together with its subsidiaries (either individually or collectively referred to as Cigna), is a global health services organization dedicated to helping people improve their health, well-being, and sense of security. Our subsidiaries are leading providers of medical, dental, disability, life, and accident insurance, and related products and services. Worldwide, we offer peace of mind and a sense of security to our customers seeking protection for themselves and their families at critical points in their lives.

Cigna participates in multiple insurance segments, including commercial and government-run programs, across the country. Specifically, we have a presence in the individual (on- and off-Exchange) and large group health insurance segments, as well as in Medicare Advantage, Medicare Supplemental, and Medicaid. We also provide specialty products – such as behavioral health services – with our domestic health insurance plans, and we offer health and health-related insurance products in over 30 countries and jurisdictions around the globe. This diverse range of businesses provides us with insight about how we can best serve our customers, and how policy changes can affect consumers and the markets that serve them.

Our experience has taught us how important the regulatory environment is to promoting competition and evolution in our nation's health care system. The right environment encourages innovation, collaboration, and choice to the benefit of consumers and the system as a whole. We believe insurers should compete by distinguishing themselves based on such relevant criteria as cost, quality, accessibility, innovation, and accountability. True competition, however, must take place on a level playing field; and Americans must be protected by ensuring that all options meet consistent standards for quality. Laws or regulations that give preferential treatment to certain options or participants can result in an unlevel playing field and misaligned incentives, further weakening our health care system. We believe the government should use its authority to assure parity for entities that assume risk or otherwise engage in the business of insurance.

Employers are uniquely positioned with a genuine interest in creating and retaining a healthy, productive, and present employee population for purposes of a thriving business. Transparent and incentive-based employer programs are a bright spot in the U.S. health care system and are driving increased consumer engagement and improved health outcomes, by supporting individuals as they engage in their health care choices. Employers have proven their sustained ability to implement programs that enhance productivity, encourage transparency, simplify choices for the individuals, and align incentives among key participants in the health care ecosystem. To further the impact of their efforts to provide quality health care for their employees, employers need the continuation of the Employee Retirement Income Security Act of 1974 (ERISA) framework to provide innovative and consistent benefit offerings.

Cigna supports the Department's goal of expanding access to quality, affordable health coverage for all individuals. However, we are concerned that Association Health Plans (AHPs) as envisioned by the NPRM could destabilize the existing commercial and employer-sponsored health insurance markets, resulting in increased costs and reduced choice for consumers. We believe it is vital that any attempt to expand availability of AHPs protect consumers and existing insurance markets. The history of AHPs is instructive and provides important lessons learned on guardrails and protections that should be included to minimize risk for consumers, insurers, states, and other stakeholders. No one will benefit from a repeat of the past when, among other things, inexperience led legitimate AHPs to set rates too low to cover claims, leaving millions of dollars in unpaid medical claims. The health care system and all those who rely on it need solutions that will improve the status quo. In that spirit, we identify specific concerns with the Department's NPRM below.

The Structure and Membership of Associations

The proposed rule includes multiple changes to current limitations on the associations that can offer AHPs and who can join them. To start, it would make it easier for employers to band together by relaxing the required commonality of interest among employer-members of an association. Further, the NPRM intends to greatly expand the number of associations offering AHPs by allowing newly-formed associations to offer AHPs, and, relatedly, by allowing associations to form for the single purpose of obtaining health coverage. Finally, the proposed rule also would expand the definition of "employers" able to join associations to include certain individuals. These changes represent significant departures from current practice. While deviating from status quo may expand the reach of AHPs, and, by extension, increase choice for consumers and employers, it is important to understand the implications of breaking with the current framework.

Cigna worries the above-mentioned elements – individually and in totality – could expose consumers and existing insurance markets to unnecessary risk. For example, allowing new associations to form solely for the purpose of obtaining health coverage could create opportunities for unscrupulous associations to defraud customers. The relaxed commonality of interest test appears to position AHPs to seek only healthy risk, thereby skewing the existing individual, small group, and large group markets and increasing instability in them. Furthermore, the NPRM does not do enough to prevent dishonest associations from defrauding customers. Nor does it ensure the skimpy and unreliable coverage offered by AHPs in the past would not return. Finally, allowing certain individuals to be considered employers for AHP purposes not only raises questions about how successful those AHPs will be, but it could have far-reaching implications and negative consequences for existing markets.

The proposed rule expands the "commonality of interest" test for associations to allow employers to band together for the express purpose of offering health coverage if they either are: (1) in the same trade, industry, line of business, or profession; or (2) 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).

The same trade and geographic tests are too broad and could lead to associations whose members lack any reasonable relationship to one another as employers or have any overlapping interest in the health outcomes of their members. Employers have a vested interest in building a health care community that is focused on helping their employees remain healthy, present, and engaged. Attempting to bring together disparate groups of employers and their employees, linked only by a broad industry category or a common geographic location, will destabilize the risk-sharing arrangements that allow insurance to function effectively.

For example, the NPRM would make an administrative employee at a manufacturing company in a given state potentially eligible for enrollment in several AHPs that might be established: that metropolitan area's AHP; a state, regional, or national industry-specific AHP; a state, regional, or national administrative employees' AHP; a state, regional, or national AHP for manufacturing companies; and perhaps others. This multiplicity of options paired with limited controls on employers' and employees' ability to move in and out of different AHPs (or to and from the individual market in the case of working owners) could significantly impact the risk pools in the AHP and other markets. One control the NPRM does not appear to apply is requiring an AHP to verify an employer's assertion that it is eligible to join that AHP. Given the breadth of the proposed commonality of interest test, such verification is the bare minimum to assure some level of connection among members of an AHP and to protect against gaming.

Additionally, the proposed rule would allow "former employees" to join an AHP, but does not define which former employees qualify. This seemingly open-ended category could further expand AHP membership in a way that is not only unprecedented, but that distorts the notion of shared concerns that the commonality of interest test is meant to ensure.

By allowing the formation of associations solely for the purpose of offering health coverage, Cigna is concerned the NPRM creates opportunities for fraud, imbalances the playing field, and diminishes the distinctions between associations and insurers. Our concerns stem from the unmanageable volatility that would result from opening the complicated world of offering health benefits and coverage to entities that never existed before and have no credible experience calculating risk exposure. Newly-formed AHPs would have no experience in providing health coverage, and would have come together exclusively to offer benefits to groups of employers who bear little to no relationship to each other. The potential for fraud is the result of making the universe of issuers broad enough to include unknown and unproven actors. The disrupted playing field is the result of different requirements imposed on different entities offering the same product in the same competitive landscape. The blurring of the line between insurers and associations is the result of letting associations serve some of the same purposes as insurers without meeting many of the same requirements.

Allowing the creation of newly-formed associations and associations formed solely for the purpose of obtaining health coverage presents opportunities for gaming by allowing some associations to select favorable risk, effectively discriminating against certain populations or industries at higher risk for health claims. AHPs have a long history of consumer fraud and abuse, leaving thousands of consumers with unpaid medical bills. The proposed rule opens the door for newly-formed AHPs to manipulate the market by operating at a competitive advantage – without the licensure, governance, and financial stability requirements that protect consumers. Licensed insurers are heavily regulated by both the states in which they operate and the federal government. This established regulatory structure serves to protect consumers and governments. Under the proposed rule, AHPs would not be subject to the same requirements, leaving everyone potentially exposed when there is a situation involving fraud, insolvency, or default.

In order to address these concerns, the Department should continue to rely on its existing "bona fide association" standard rather than proceed with the proposed changes. Furthermore, the Department should ensure that if an entity is engaging in a practice that closely resembles the offering of insurance, particularly across state lines, then such entity must be subject to the same laws and regulations as licensed insurers. This is the best way to protect existing insurance markets and the consumers who benefit from them.

Expanded Definition of "Employer" to Include Working Owners

The proposed rule would expand the definition of "employer" under ERISA to expressly include working owners, such as sole proprietors and other self-employed individuals. Currently, federal law does not consider self-employed individuals without common law employees to be employers. Any definitional change in ERISA could have significant and widespread implications in the future, and should require definitive legislative action. This proposed expansion exceeds DOL's authority under ERISA and will exact serious negative consequences on existing insurance markets. Cigna believes the statutory definition of "employer" should continue to exclude self-employed individuals who lack any employees. ERISA has consistently applied to working owners only when they have employees and can be considered both an owner of a business and employee of the same. Without any employees, a working owner is not an employer. DOL's long-standing position, reaffirmed in regulations and guidance over the course of decades, and the U.S. Supreme Court's interpretation of ERISA are consistent that a working owner can participate in a Title I benefit plan only if there are other employees alongside the working owner.

Licensed Insurer Operation of AHPs

The proposed rule expressly excludes health insurance issuers from owning or controlling a group or association plan. Cigna agrees the association should own the association plan. However, we believe the AHP structure would be strengthened if licensed health insurers are permitted to operate or administer association plans. Licensed insurers are uniquely capable of guarding against fraud and already subject to measures designed to avoid insolvency, thereby protecting stakeholders. Furthermore, insurers have significant abilities that could benefit those offering and buying AHPs, such as designing benefits, controlling health care costs, and developing provider networks. Cigna and others have decades of experience administering large group and self-funded plans; and our success as an industry depends on earning and retaining trust through responsible business practices and good corporate citizenship. Therefore, Cigna requests the Department clarify that licensed insurers are able to operate or administer AHPs.

Thank you for your consideration of these comments and recommendations.

Respectfully,

David Schwartz