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Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue N.W.
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 the proposed regulation, "Definition of 'Employer' Under Section 3(5) of ERISA—Association Health Plans" (83 Fed. Reg. 614 (Jan. 5, 2018)) (AHP Proposed Rule). This proposed regulation expands the criteria under ERISA for determining when employers may join together in an association that is treated as the ERISA "employer" of a single, multiple employer group health plan. I submit this comment letter on behalf of the New Jersey Department of Banking and Insurance.

Before turning to New Jersey's state-specific comments on the proposed regulation, please note that New Jersey endorses the general comments submitted by the National Association of Insurance Commissioners (NAIC) with regard to state insurance commissioners' long history of regulating insurance in general and Multiple Employer Welfare Arrangements (MEWAs) in particular, and the importance of that state-based regulation for consumer protection. The history of insolvencies of MEWAs has demonstrated the need for state regulation, and Congress enacted amendments to federal law in 1983 to give state regulators such powers. Since that time, solvency regulation by state insurance commissioners has been key in ensuring MEWAs members, and the providers rendering care to those members, receive the benefits promised.

New Jersey also agrees that it is particularly important that the federal rule, if implemented, not threaten the states' abilities to enforce existing laws or enact laws in the future that regulate insurance. States – like New Jersey – remain in the best position to monitor closely what is happening in their insurance markets and have the tools in place to respond quickly as issues arise. This has long been considered of particular importance in New Jersey.

New Jersey law requires that employer associations/MEWAs – whether insured, partially insured or self-funded – with small employer members must provide coverage to those small employers in accordance with the comprehensive standard health benefits plans that are approved and promulgated by our Small Employers Health Benefits Program Board. N.J.S.A. 17B:27A-48; N.J.S.A. 17B:27C-8 (New Jersey small employer market is an employer with 50 or less employees).

The rule proposal states that it does not intend to impact the ability of states to regulate MEWAs; however, with a plain language reading of the amendment, the intent of the rule and the impact on New Jersey is unclear. We urge the Department of Labor (DOL) to clearly state that the rule in no way limits the ability of states to continue their existing regulation of multiple employer associations/MEWAs, especially with respect to members that are defined as small employers under State law. Despite the clear language in N.J.S.A. 17B:27A-48 and N.J.S.A. 17B:27C-8, entities in the past have unlawfully sold non-compliant coverage in New Jersey and extensive state administrative enforcement actions were needed to protect our small employers, their employees and medical providers, ensuring that they had the protections required under New Jersey law. Since those enforcement actions took time, and until those instances of noncompliance were addressed, many citizens failed to enjoy all of the protections to which they were entitled under New Jersey law. In addition, there were financial expenditures for the State associated with these investigations and subsequent cessation of the plans. On these grounds, we urge the DOL to affirm the states' continued ability to enforce their laws applicable to association plans/MEWAs and not inadvertently encourage the formation of new non-compliant plans.

New Jersey enacted significant reforms for our small employer market that were first effective in 1994. While enrollment in small employer plans steadily and significantly increased as a result of the reforms, enrollment began to decrease with the economic recession in 2008. Even after recovery from the recession, enrollment continues to decline. While small employers are not able to join associations to be treated as large employers, small employers, particularly those with younger, healthy lives, are becoming increasingly attracted to self-funded programs. Many small employers are unwilling or unable to participate in self-funded programs which means the small employer plans continue to be purchased. However, if the association health plan proposal were to be adopted, and if the DOL were to take the position that the regulation pre-empts state law, employers currently securing coverage in the small employer market may find the rates for a large group association plan more attractive and exit the small employer market. The resulting loss of participation in the small employer market would increase adverse selection and further increase costs.

New Jersey appreciates the desire to enable small employers to have more plan choices at what may be lower premium rates. However, if the rule requires New Jersey to ignore the nature of employer members in the association/MEWA, then the rule will deprive New Jersey small employers of the comprehensive benefits they are promised under State law. Simply put, the associations/MEWAs would be free to offer plans that are not as comprehensive as those required to be sold to small employers. Furthermore, standard small employer plans in our State contain benefits far richer than those that are mandated by New Jersey law for large groups. To the extent the association plan is issued outside of New Jersey, the benefits would not even include New Jersey mandated benefits. The more affordable premium comes with a cost – less coverage for small employers.

Despite the DOL's efforts in the rule proposal to prohibit discrimination, we are concerned that monitoring and enforcement of the association/MEWA plans will be problematic if the definition of employer is expanded to eliminate the long-standing requirements for "bona fide" employer groups/associations. The Department is concerned that these associations/groups will be subject to increased levels of impermissible medical underwriting. The concern is even more acute as the proposed definition of eligible employers includes employer types that are required to seek coverage in the individual market under the Affordable Care Act. Medical underwriting increases adverse selection and the premiums in the individual and small employer markets. The result leads carriers to withdraw from the market or at least reduce plan offerings; this is commonly called the adverse selection "death spiral". Overall, the expanded availability of association plans would lead to fewer carrier and plan choices that provide comprehensive coverage. The reduction in plan offerings will leave the population that needs comprehensive coverage with few or no options, and any available options will have very high premiums. For these reasons, any expansion of the definition and implementation of the proposed regulation should continue to permit states – like New Jersey – to enforce long-standing laws aimed at preventing such a death spiral and ensuring our consumers have comprehensive coverage.

Thank you for this opportunity to comment.

Sincerely,

Marlene Caride
Acting Commissioner