

March 6, 2018

The Honorable R. Alexander Acosta
Secretary, U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Mr. Preston Rutledge
Assistant Secretary, Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

RE: Definition of “Employer” under Section 3(5) of ERISA – Association Health Plans (RIN 1210-AB85)

Dear Secretary Acosta and Assistant Secretary Rutledge,

Public Citizen appreciates the opportunity to comment in response to the proposed rule, Definition of “Employer” under Section 3(5) of ERISA – Association Health Plans. Public Citizen is a consumer advocacy organization with more than 400,000 members and supporters nationwide. We represent consumer interests through lobbying, litigation, administrative advocacy, research, and public education on a broad range of issues, including consumer rights in the marketplace, product safety, financial regulation, worker safety and safe and affordable health care.

Public Citizen writes with strong objection to the proposed rule on Association Health Plans (AHPs), which would loosen the standards for allowing employers to form AHPs. In practice, the proposed rule would allow small employers to purchase plans that lack the basic protections that were included in the Affordable Care Act (ACA). We have deep concerns that the proposed rule will weaken the individual and small group markets that are critical sources of coverage for people with preexisting health conditions. The rule may lead some small employers have lower costs, but at significant risk. The history of AHPs is one of fraud and insolvency – leaving consumers with unpaid medical bills and no health coverage. Moreover, the rule would increase cost and limit choice for all other employers and individuals in less-than-perfect health.

If the Department of Labor (“the Department”) were to unadvisedly move forward with finalizing this rule, we strongly urge that at a minimum, nondiscrimination provisions be maintained. We also strongly oppose any effort to limit states’ full authority to regulate AHPs. Both are critical to stem the damage that the proposed rule will cause for insurance markets and individual consumers.

I. AHPs have a history of fraud and insolvency.

For the 30 years prior to the ACA, AHPs were frequently used as a vehicle for selling fraudulent insurance coverage. Scams initially flourished after Congress exempted AHP arrangements from state oversight in 1974 through the Employee Retirement Income Security Act (ERISA).¹ The operators of

¹Kofman, M. (2005). Association Health Plans: Loss of State Oversight Means Regulatory Vacuum and More Fraud. Georgetown University Health Policy Institute. Retrieved 8 February 2017, from <https://hpi.georgetown.edu/ahp.html>

these fraudulent AHPs targeted small businesses and self-employed people, and then collected premiums for non-existent health insurance, did not pay medical claims, and left businesses and individuals with millions of dollars in unpaid bills and patients without health insurance coverage.² AHPs would often set up headquarters in one state with limited regulatory oversight and market their insurance policies to businesses and consumers in other states with more robust regulation, thereby bypassing those states' more protective rating and benefit standards.³

In 1982, Congress responded to widespread fraud by amending ERISA to clarify states' authority to regulate association health plans and multiple employer welfare arrangements (MEWAs).⁴ Because of this broad authority, many states limited the potential risks, including fraud, insolvency, and market segmentation, associated with the expanded AHP market.⁵ Even with increased oversight, fraudulent insurance sold through associations remained a problem. Researchers found that between 2000 and 2002, 144 AHP operations left over 200,000 policyholders with over \$252 million in medical bills.⁶ Four of the largest operations left 85,000 people with over \$100 million in medical bills.⁷ For consumers and patients, the results were disastrous: some victims were forced into bankruptcy; others have lifelong physical conditions as a result of delayed or foregone medical care due to misplacing their trust in a fraudulent or failed AHP.⁸

AHPs also have a long history of financial instability and insolvency when medical claims exceed the association's ability to pay. There are no federal financial standards to guarantee that AHPs will remain financially stable, even as the proposed regulation could allow AHPs to cover millions more individuals and small employers.

We are extremely concerned that the proposed regulation will once again leave consumers and patients in AHP arrangements with insufficient coverage, unpaid medical bills, and lifelong health implications – just as AHPs did before the ACA provided more oversight and protection from these health schemes.

II. AHPs will weaken the individual and small group markets.

The Department states that the proposed rule will provide additional opportunities for employer groups or associations to offer coverage alternatives to small businesses that are more affordable than insurance currently available on the individual and small group market. The only way, however, that the

²Kofman, M. (2005). Association Health Plans: Loss of State Oversight Means Regulatory Vacuum and More Fraud. Georgetown University Health Policy Institute. Retrieved 8 February 2017, from <https://hpi.georgetown.edu/ahp.html>

³Lucia, K. & Corlette, S. (2018, January 24.) Association Health Plans: Maintaining State Authority Is Critical to Avoid Fraud, Insolvency, and Market Instability. The Commonwealth Fund. Retrieved 8 February 2017, from <http://www.commonwealthfund.org/publications/blog/2018/jan/association-health-plans-state-authority>

⁴Association Health Plans are a type of multiple employer welfare arrangements (MEWAs).

⁵ Lucia, K. & Corlette, S. (2018, January 24.) Association Health Plans: Maintaining State Authority Is Critical to Avoid Fraud, Insolvency, and Market Instability. The Commonwealth Fund. Retrieved 8 February 2017, from <http://www.commonwealthfund.org/publications/blog/2018/jan/association-health-plans-state-authority>

⁶Kofman, M. (2005). Association Health Plans: Loss of State Oversight Means Regulatory Vacuum and More Fraud. Georgetown University Health Policy Institute. Retrieved 8 February 2017, from <https://hpi.georgetown.edu/ahp.html>

⁷Ibid.

⁸Ibid.

coverage will be more affordable is if it has fewer protections against fraud and insolvency, covers fewer benefits, or syphons healthier individuals and small groups from other markets.

As part of the implementation of the ACA, the Centers for Medicare and Medicaid Services (CMS) provided guidance to bring AHPs in line with the standards and consumer protections in the ACA. CMS required that health insurance policies sold through an association to individuals and small employers must be regulated under the same standards that apply to the individual market or the small-group market.⁹ Because of this guidance, known as the “look through” doctrine, the coverage was required to comply with the ACA’s protections for people with preexisting conditions and other standards such as the essential health benefits (EHB).

The proposed regulation would create an uneven playing field between AHPs and the individual and small-group markets. Because the rule would subject AHPs to substantially weaker standards than ACA-compliant plans, the plans could be structured and marketed to attract younger and healthier people, thus pulling them out of the ACA-compliant small-group market and leaving older, sicker, and costlier risk pools behind. If healthier individuals and small groups are syphoned from the individual and small group markets, costs will increase and plan choices will decrease for employers and individuals remaining in those markets. Consumers who need comprehensive coverage, including those with preexisting conditions, and consumers with incomes too high to qualify for subsidies, would face rising premiums and potentially fewer plan choices.

III. AHPs should not be allowed to sell junk insurance and charge higher premiums to businesses based on employees’ age, gender or industry.

Currently, AHPs are regulated by the “look-through” doctrine set forth in 2011 guidance from CMS.¹⁰ This guidance has the effect of looking through the association to understand who is purchasing coverage through an AHP, and then to determine regulation of the insurance products. Currently, AHP products sold to individuals are considered to be individual market insurance and AHP products sold to small employers are considered to be small group market insurance. The insurance products are then subject to the same requirements and consumer protections that exist in those markets under the ACA.

The proposed regulation would not apply the look-through doctrine to AHPs that fit the new definitions of associations in the rule. As a result, an AHP would be treated as a single plan providing large employer coverage, and therefore exempted from the individual and small group market protections.

By exempting an AHP from the look-through doctrine, plans offered to working owners and small employers would be exempt from the requirement to provide essential health benefits. For instance, individuals and small employers would not necessarily have coverage that includes benefits such as maternity care, prescription drugs, and mental health and substance use services. We are extremely concerned that this will take consumers and patients back to the days before the Affordable Care Act, when plans frequently failed to meet the needs of individuals and families and leaving them without critical care.

⁹The Center for Medicare and Medicaid Services. (2011, September 1.) “Application of Individual and Group Market Requirements under Title XXVII of the Public Health Service Act when Insurance Coverage Is Sold to, or through, Associations.” Retrieved 8 February 2018, from

https://www.cms.gov/CCIIO/Resources/Files/Downloads/dwnlds/association_coverage_9_1_2011.pdf

¹⁰Ibid.

As a result of this proposed rule, AHPs could substantially scale back their benefits, dropping benefits entirely or dramatically limiting them. Limiting plan benefits was a predatory practice that existed before the ACA as a way to discourage anyone with a preexisting health condition or high expected health care utilization from enrolling in coverage. For example, before the ACA:

- The vast majority of plans in the individual market did not cover maternity care. In fact, only 12 percent of plans in the individual market covered this benefit.¹¹ Even among plans that covered maternity services, the coverage was not always comprehensive or affordable. One study found that several plans charged a separate maternity deductible that was as high as \$10,000, and some plans had waiting periods of up to a year before maternity care would be covered.¹²
- One in five people enrolled in the individual market lacked coverage for prescription drugs.¹³ Prescription drugs are vitally important to individuals with HIV, hepatitis, cancer, Multiple sclerosis (MS), epilepsy and many other conditions. Rolling back coverage of prescription drugs means individuals and families would not be able to access the medicine they need to prevent or manage ongoing health conditions.
- Mental health coverage was often excluded from plans, or was very limited.¹⁴ It is estimated that over 32 million people gained access to coverage for mental health services, substance use disorder treatment or both benefits under the ACA.¹⁵

The proposed rule puts the economic stability and health of consumers at risk by allowing employers to offer limited coverage that fails to meet the needs of individuals and families, as guaranteed by the ACA. A small employer, for example, with a relatively healthy workforce might offer an AHP with low premiums but that also provides limited benefits. If an employee later develops a health condition such as cancer or HIV, or requires hospitalization – they could suddenly find that necessary care or treatment is not covered.¹⁶

While the proposed rule prevents health status rating of separate employers, the rule appears to allow groups or associations to base premium rates on any other factor, including gender, age, industry and other factors actuaries create to estimate health care utilization. Plans would be exempt from the rating protections that apply to individual and small group markets. Small businesses with a workforce that is older, disproportionately women, or in industries that are believed to attract high health care utilizers would suffer the most.

¹¹National Women’s Law Center. (2012). Turning to Fairness: Insurance Discrimination against Women Today and the Affordable Care Act. Retrieved 14 December 2016, from http://www.nwlc.org/sites/default/files/pdfs/nwlc_2012_turningtofairness_report.pdf

¹²Ibid.

¹³Palanker, D., Volk, J., & Giovannelli, J. (2017, March 15). Eliminating Essential Health Benefits Will Shift Financial Risk Back to Consumers. The Commonwealth Fund. Retrieved 23 March 2017, from <http://www.commonwealthfund.org/publications/blog/2017/mar/eliminating-essential-health-benefits-financial-risk-consumers>

¹⁴Ibid.

¹⁵U.S. Department of Health & Human Services. (2013, February). Affordable Care Act Will Expand Mental Health and Substance Use Disorder Benefits and Parity Protections for 62 Million Americans. Retrieved 23 March 2017, from https://aspe.hhs.gov/sites/default/files/pdf/76591/rb_mental.pdf

¹⁶Lueck, S. (2018, January 8.) Trump Rule on Association Health Plans Could Devastate Small-Group Markets. Retrieved 8 February 2018, from <https://www.cbpp.org/blog/trump-rule-on-association-health-plans-could-devastate-small-group-markets>

Currently, because of the ACA protections, plans are prohibited from basing premiums on anything other than age (within a 3:1 ratio for adults), tobacco use, family size, and geography. As one example of problematic rating practices before the ACA took effect, 92 percent of best-selling plans on the individual market practiced gender rating, costing women approximately \$1 billion a year.¹⁷ While the proposed rule would protect *individuals* from being charged more because of their gender, it appears that employers with higher rates of female employees could be charged higher premiums, which would ultimately be passed down to their employees.

Similarly, the age and industry of employers could lead to higher premiums for employers with older employees or in certain industries because these factors can be used as a proxy for higher health care utilization and/or employees with less-than-perfect health.

We strongly recommend that the Department continue to apply the “look-through” doctrine, rather than treat AHPs as large group plans; if an AHP is offering coverage to individuals, including working owners, or small employers, the plans should be required to meet standards and protections set forth in the ACA.

IV. States must retain authority to regulate multiple employer welfare arrangements (MEWAs).

The proposed rule raises questions about preemption of state law. We oppose preemption of state laws and would consider any attempt by the Department to preempt states through this rulemaking as a usurpation of the rights of individual states to provide greater protections for their residents. Any preemption of state’s rights should be done through Congressional lawmaking, extremely judiciously, and reserving states’ ability to put in place stronger safeguards.

While the Department states that the proposed rule does not alter existing ERISA statutory provisions governing MEWAs, we are concerned that it will have the result of preempting existing and future efforts by states to regulate MEWAs. The proposed rule’s new framework allowing many more AHPs to be treated as large, single employer plans invites new insurance scams by creating confusion about states’ enforcement authority over AHPs. Under the proposed rule, it is unclear how far a state could go in regulating AHPs without violating federal standards. In the past, promoters of fraudulent health plans have used this type of regulatory ambiguity to avoid state oversight and enforcement activities that could have otherwise quickly shut down scam operations.¹⁸

We urge the Department to clarify that ERISA single employer AHPs, including those that cover more than one state, would have to comply with all state laws in states in which they operate and continue to be subject to state oversight and regulation. This will more clearly maintain states’ ability to protect consumers from the potential ramifications of fraudulent or insolvent AHPs, and to manage their insurance markets.

¹⁷National Women’s Law Center. (2012). Turning to Fairness: Insurance Discrimination against Women Today and the Affordable Care Act. Retrieved 14 December 2016, from http://www.nwlc.org/sites/default/files/pdfs/nwlc_2012_turningtofairness_report.pdf

¹⁸Lucia, K. & Corlette, S. (2018, January 24.) Association Health Plans: Maintaining State Authority Is Critical to Avoid Fraud, Insolvency, and Market Instability. The Commonwealth Fund. Retrieved 8 February 2017, from <http://www.commonwealthfund.org/publications/blog/2018/jan/association-health-plans-state-authority>

In addition to opposing preemption of states' laws, we strongly oppose any proposal that would exempt AHPs from state regulation, including by state insurance commissioners. States have long taken the lead in addressing AHP insolvencies and fraud and maintaining competitive markets, and any attempt to preempt state authority would harm consumers. The Department's inability to serve as the sole regulator has been well documented. The Department neither has the resources nor the expertise to serve as the sole regulator, both of which weigh strongly against the Department taking action to prevent states from regulating. Any attempts to issue class or individual exemptions for AHPs would be an attack on the states and would only serve to fuel fraud and insolvency.

V. Individuals and small businesses must be notified if AHPs are not meeting minimum value or providing all the essential health benefits.

We appreciate the Department's request for information about required notices to offer important information to consumers. AHPs should be required to provide notice to employer groups and potential beneficiaries if plans do not meet standards for minimum value—meaning they provide requisite coverage of payments and services. This will ensure that employer groups and employees know that the plans are less comprehensive than health plans available in the individual or small group markets. Further, if the AHP does not meet minimum value, the employees and their dependents must be made aware of their right to receive coverage through the health insurance marketplaces, potentially with premium tax credits based on their income. Similarly, AHPs should be required to notify employer groups and potential beneficiaries of any essential health benefits not covered by their plans.

The Department should also clarify that all notice requirements that apply to group health plans apply to plans under this regulation, including notice of appeal rights, summary of benefits and coverage, and summary plan descriptions.

VI. Retain existing law to prevent fraudulent entities from creating AHPs.

Proposed regulation at §2510.3-5 (b) allows a bona fide group or association of employers to exist for the *sole* purpose of offering health insurance, reversing decades of guidance that protect employers, beneficiaries, and insurance markets. Allowing a bona fide group or association to exist for the sole purpose of offering health insurance opens the door for fraud and financial insolvency. For example, an individual or entity could create an AHP that appears to meet all requirements of employer participation but places financial control in the hands of an individual that intends to defraud employer groups or leads to insolvency. By requiring only minimal qualifications for offering an AHP, the Department is opening the door to entities creating AHPs with the explicit purpose of defrauding small employers and individuals as AHPs could more easily establish and quickly expand across state lines. The Department should retain existing law that a group or association cannot exist solely for the purpose of sponsoring a group health plan.

VII. The Department should retain the commonality of interest test.

The proposed regulation (at §2510.3-5 (c)) significantly weakens the commonality of interest test, which is meant to show a commonality of interest related to the employers participating in the AHP. Under current rules, eligible association members must share a common interest (generally, operate in the same industry), join together for purposes other than providing health insurance, exercise control over the AHP, and have one or more employees in addition to the business owner and spouse. The existing commonality of interest test prevents groups and associations from circumventing protections that

apply to the individual and small group markets by requiring that associations be established for a purpose other than offering insurance.

The proposed changes to the commonality of interest test would eliminate that requirement and would instead allow association to be based on member employers' line of business or trade, or on geography, regardless of industry. The proposed test is so broad that employers with no common interest will be allowed to join together as an AHP, opening the door to fraudulent entities to offer coverage.

The Department should retain the existing commonality of interest test based on facts and circumstances. If the commonality of interest test is changed, additional factors should be required beyond shared geographic location or industry in order to limit the ability of groups or associations to form without any true commonality of interest among employers. With regard to shared geography, the final rule must prevent arbitrary definitions of shared geography that allow AHPs to carve out higher cost areas.

VIII. Individuals and small businesses must be protected from discrimination.

We are pleased that the proposed rule applies the Health Insurance Portability and Accountability Act (HIPAA) nondiscrimination provisions in § 2590.702(a) and § 2590.702(b) to AHPs. The nondiscrimination provisions prevent AHPs from discriminating based on health status related factors against employer members or employers' employees or dependents. As proposed, this would prevent AHPs from using health factors to determine eligibility for benefits or in setting premiums. Health factors include: health status, medical condition, claims experience, receipt of health care, medical history, genetic information, evidence of insurability, or disability. We applaud this proposal, as it is essential to help protect both employers and their employees from discrimination based on health status. We strongly encourage the Department to retain this requirement in the final rule, if it moves forward. We support this provision applying to all AHPs, regardless of when in time they were established. AHPs currently in operation should be required to fully comply with nondiscrimination requirements, without exception and without delay.

While this is an important provision of the proposed regulation, it does not go far enough because an AHP can engage in other practices that result in discrimination against people with medical needs. The proposal exempts AHPs from ACA consumer protections designed to protect people with preexisting conditions. An AHP would be exempt from EHB provisions, rate reforms, guaranteed issue and single-risk pool requirements. Consequently, an AHP can simply avoid covering people and businesses with medical needs. And, using benefit design, an AHP can attract healthier groups. For example, individuals and small employers would not necessarily have access to coverage that includes maternity, mental health benefits, and expensive prescriptions. People who need such coverage would not enroll in AHP coverage. Also, an AHP could discriminate in rates, charging women higher rates than men, charging smaller businesses higher rates than larger businesses, charging businesses in certain industries higher rates, and charging older people higher rates without limit. These rating practices would result in healthier groups being covered through an AHP.

Furthermore, an AHP could engage in marketing practices targeted at attracting healthier people. An AHP could avoid a geographic area where there is a high incident of cancer rates, heart disease, and diabetes and thereby avoid covering sicker populations. Its geographic location can also be used to engage in redlining practices. An AHP could limit membership to a specific industry that has lower claims than other industries. All of these, and other discriminatory practices, would be allowed because AHPs

would be exempt from ACA protections, including EHB, rate reforms, and preventing discrimination against those with preexisting conditions.

In order to more meaningfully prevent discrimination, the Department should also strengthen the protections in this provision by preventing groups or associations from varying their premium rates offered to different employer members based on gender, age, zip code or other geographic identifier, industry, or other factor that may be used to increase rates based on expected health care utilization. The final rule should also apply EHB, guaranteed issue and single-risk pool requirements. The single-risk pool requirement is an important way to ensure that AHPs, where they exist, do not result in a segmented market.

Failure to extend these protections, in addition to protections against discrimination based on health status, to AHPs will expose employers and their employees to discriminatory practices, including discriminatory rating and marketing practices. Failure to extend these protections will also place the regulated health insurance markets in jeopardy, as AHPs would be free to cherry pick healthy consumers out of the regulated markets, leaving those markets to fail as the risk pool worsens and premiums spiral out of control.

IX. “Working owners” should not be allowed to join AHPs.

The proposed rule allows working owners to join AHPs providing ERISA plans. In 2016, 31 percent of the individual or small group market was self-employed.¹⁹ This rule effectively allows those individuals to join AHPs that function as large group employer plans. We are deeply concerned that as a result, AHPs will be able to design and market plans to cherry-pick healthy individuals out of the ACA-complaint individual market, resulting in increased rates and decreased choice in the individual market.

In addition, the broad definition of AHPs means that they do not have to confirm that an individual is actually a “working owner”; this opens up the ability for any individuals, regardless of whether they are true “working owners” to purchase coverage through an AHP. The Department should not allow associations to have working owners qualify as both an employer and as an employee, as this will bring instability to the individual market.

IX. Conclusion

Overall, this rule would hurt patients by driving up costs and threatening access to health care for millions. More Americans would end up with poorly regulated plans, leaving patients with unpaid medical bills and potentially forcing them to take on medical debt or face medical bankruptcy. This rule would destabilize the ACA as insurers providing such plans would cherry-pick the young and healthy, leaving the sick to be covered under plans that continue to have ACA protections.

The sale of poorly regulated plans threatens Americans’ safety by driving up health care costs for the most vulnerable. This proposed rule would take us back to a time when unethical insurers issued poorly regulated plans to consumers and abandoned them when they got sick.

¹⁹Kaiser Family Foundation. (2016, May 20.) Survey of Non-Group Health Insurance Enrollees, Wave 3. Retrieved 16 February 2018, from <https://www.kff.org/health-reform/poll-finding/survey-of-non-group-health-insurance-enrollees-wave-3/>

Thank you for this opportunity to comment in response to the proposed rule, Definition of “Employer” under Section 3(5) of ERISA – Association Health Plans. If you have any questions or concerns about our recommendations, please contact Eagan Kemp at ekemp@citizen.org or 202-454-5109.

Sincerely,

A handwritten signature in black ink, appearing to read "Eagan Kemp", with a large, stylized flourish extending to the right.

Eagan Kemp

Health Care Policy Advocate
Public Citizen