STATE OF CALIFORNIA *Dave Jones, Insurance Commissioner*

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Employee Benefits Security Administration
Room N-5655
U. S. Department of Labor
200 Constitution Avenue NW
Washington, C.C. 20210

SUBJECT: Comments regarding proposed rule, Definition of "Employer" Under Section 3(5) of ERISA—Association Health Plans, 83 Fed. Reg. 614 (Jan. 5, 2018) RIN 1210-AB85

To Whom It May Concern:

California is the home of the nation's largest insurance market, where insurers collect $289 billion a year in premiums. As California's Insurance Commissioner, I run the largest consumer protection agency in the state and am responsible for both protecting consumers and regulating a vibrant insurance market. I write to object to the proposed rule on association health plans (AHPs) because of the significant risk it poses for health insurance markets in California and the nation. The AHPs proposed by this rule will harm consumers by degrading the individual and small group health insurance markets through adverse selection, and will impinge upon states' rights while opening the door to fraud, insolvency and abuse.

Scope

By its own terms, this proposed rule seeks only to modify the definition of "Employer" by adding section 2510.3–5 to title 29 of the Code of Federal Regulations. Proposed subdivision (a) of the new section explicitly states that the scope of the new rule is limited to a "multiple employer group health plan," which are multiple employer welfare arrangements commonly referred to as MEWAs.[1] The preamble specifies that "association health plans" are a type of MEWA, the proposal is limited to MEWAs, and no new species of AHP is proposed to be created outside the MEWA context.[2] Accordingly, any extension outside of the MEWA context in the final rulemaking would be outside the scope of the proposed rule.

[1] MEWAs are defined at 29 U.S.C.A. § 1002(40).
[2] Definition of '"Employer"' Under Section 3(5) or of ERISA—Association Health Plans, 83 Fed. Reg. 614, 617 n.4, 625 (Jan. 5, 2018).

The Proposal Ignores History of Significant Problems

While the preamble to the proposed rule recognizes that AHPs are a form of multiple employer welfare arrangement (MEWA), and recognizes the history of fraud, insolvency and abuse surrounding MEWAs,[3] the proposal itself fails to apply these lessons of past history with fraud, insolvency and abuse surrounding MEWAs. Instead, the Department of Labor's (DOL) proposed rule will allow this bad history to repeat itself in the form of the proposed AHPs.

California's history of problems related to MEWAs is instructive. During the 1980s and 1990s, "… millions of American workers and their families [were] left with millions of dollars in unpaid medical bills by unscrupulous individuals who target small businesses and self-employed people through legitimate and phony associations (MEWAs), and collect[ed] premiums for non-existent health insurance."[4] Specifically, "from 1988 to 1991, scams left 400,000 people with more than $123 million in unpaid medical bills. Between 2000 and 2002, 144 scams left more than 200,000 policyholders with more than $252 million in medical bills."[5]

Specific examples of harm to California consumers from unscrupulous MEWAs further illuminate the potential risks of the proposed rule. In 1982, Tarzana-based American Benefits Ltd. collapsed, leaving 70,000 subscribers without coverage, and with liabilities "substantially exceeding $10 million …" against assets of $250,000.[6] There were 20,000 claim holders, including major hospitals. The 70,000 subscribers had paid premiums in total of about $3.7 million per month and were left without health coverage.[7]

Similarly, Irvine-based Rubell-Helm Insurance Services, Inc. collapsed in early 1990, leaving $10 million in unpaid medical claims. The company was shut down in three different states for operating an illegal insurance operation. Rubell and Helm paid themselves $369,200 per year in salaries and used company funds to remodel their homes and hire a personal tailor, among other personal expenses.[8] They also often removed funds from accounts containing premium payments to cover operating expenses.

Lawsuits brought by the U.S. Department of Labor developed further evidence of MEWA risks. A 1994 suit included a MEWA based in California that had improperly diverted more than $1.1 million before collapsing, leaving "as many as 20,000 unsuspecting workers holding the bag for millions of dollars in unpaid claims."[9] Also, Employee Staffing Services of Dallas, which

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[3] 83 Fed. Reg. at 617.
[4] California Healthcare Foundation, *Issue Brief: Group Purchasing Arrangements: Implications of MEWAs*, at 8 (July 2003), *available at* https://www.chcf.org/wp-content/uploads/2017/12/PDF-HIMUbriefMEWAs.pdf.
[5] Mila Kofman et al., *Association Health Plans: What's All the Fuss About?* 25 HEALTH AFFAIRS 1591-1602 (Nov. 2006, Vol. 25, No. 6), *available at* https://www.healthaffairs.org/doi/pdf/10.1377/hlthaff.25.6.1591.
[6] Bruce Keppel, *Health Insurance Company Found 'Hopelessly' in Debt*, LOS ANGELES TIMES, Oct. 7 1982, at B3.
[7] California Healthcare Foundation, *Issue Brief: Group Purchasing Arrangements: Implications of MEWAs*, at 8 (July 2003).
[8] Robert L. Jackson, *Workers Bilked by Phony 'Health Insurance' Firms*, LOS ANGELES TIMES, May 16, 1990, at A12.
[9] Robert Naylor Jr., *Insurance Scam Claimed – Encino Group Among Those Accused of Running Bogus Operations*, ASSOCIATED PRESS. Apr. 1, 1994, at B3.

operated in California and six other states, faced allegations that it had mismanaged more than 300 health plans, "leaving an estimated $1 million in unpaid benefits."[10]

Further, in 2001 and 2002, two nationwide MEWAs with offices in California—Employers Mutual LLC and American Benefit Plans—were shut down, leaving about 70,000 workers and their families with an estimated $70 million in unpaid medical bills. In 2001, Sunkist Growers and Packers Benefit Plan Trust collapsed, "… forcing tens of thousands of workers to switch insurance and leaving nearly 5,000 medical providers with unpaid bills."[11] The plan covered 23,000 subscribers. When they collapsed, the plan owed 4,800 medical providers an estimated $10 million in unpaid claims.[12] These examples explain why this Department and I, as Insurance Commissioner, oppose attempts to expand the use of MEWAs.

The proposed rule is a perfect storm of bad ideas: it eradicates requirements that AHPs be formed for a purpose beyond insurance; it weakens the commonality of interest requirements, allowing AHPs to meet that requirement if the employers have a principal place of business in a region that does not exceed the boundaries of the same State or same metropolitan area; it allows working owners to be considered both an employer and an employee; and it allows group size to be defined by the size of the AHP rather than the employer, and imposes less rigorous nondiscrimination and coverage standards on AHPs than coverage in the individual and small group markets, thereby creating an uneven playing field.[13] These proposed actions, which weaken the commonality of interest rules, broaden availability of AHPs, and allow AHPs to be treated as a single employer, invite a recurrence of the fraud and abuses of the past, and will require substantial additional state and federal oversight resources.[14]

Adverse Selection, Adverse Market Impact

Expanding the permissible scope of AHPs by changing the definition of "employer" introduces a destabilizing force in the market which will act to degrade the risk mix in the individual and small group markets. Healthier employer groups (and individuals not currently within the ERISA definition of "employee") may seek flimsier and cheaper AHP coverage, while less healthy employer groups and individuals will seek comprehensive benefits through insurers in the individual and small group markets. Further, due to the rules regarding guaranteed availability of coverage, if an employer group needs more comprehensive coverage at a future date, that employer group would be guaranteed coverage through an insurer in the individual or small group market. This will essentially transform these markets into high-risk pools for the AHPs. This will lead to rate spikes and raise the specter of market failure for insurers in the individual and small group markets, resulting in market withdrawals and reduced competition. A recent study by the consulting firm Avalere determined that between 2.4 million and 4.3 million

[10] *Ibid.*
[11] Melinda Fulmer & Ronald D. White, *Sunkist's Health Plan Collapses*, LOS ANGELES TIMES, Jan. 4, 2002, at C1, *available at* http://articles.latimes.com/2002/jan/04/business/fi-sunkist4.
[12] *Ibid.*
[13] 83 Fed. Reg. at 635-636.
[14] 83 Fed. Reg. at 633.

persons would shift to the proposed AHPs by 2022, with up to 75 percent of small group AHP enrollment coming from currently insured small businesses.[15] This demonstrates the impact of AHPs on the existing risk pools. Further, Avalere determined that the introduction of AHPs would cause premiums to rise in the individual market by 4 percent, and in the small group market by 2 percent, and that 130,000 to 1400,000 individuals would become uninsured (80 percent of which would be persons previously insured in the individual market) by 2022 as a result of the proposed AHP rule.[16] Thus, the Department of Labor's assertion that AHPs will "assemble large, stable risk pool[s]" is inherently at odds with the statement in the preamble to the proposed rule that the proposal will limit the "risk of adverse effects on individual and small group markets."[17]

The Proposal May Inadvertently Result in Fraud, Discrimination

Geography alone, as specified by an AHP, should not be sufficient to satisfy a commonality of interest test; mere propinquity is an insufficient barrier to fraud by unscrupulous entities seeking to profit from sham or mismanaged AHPs at the expense of consumers and small businesses. Further, permitting carve-outs of specific geographies within a state, unconstrained by external geographic definitions within a state (such as those developed by the Census Bureau), could result in discriminatory practices, including but not limited to eligibility criteria and plan designs that discriminate against lower-income areas, or areas where workers in a predominant business experience higher incidence of disease. This is of particular concern for customers who would otherwise participate in the small group market, as there is no guaranteed availability requirement for AHPs. Similarly, the proposal regarding "working owners," which would permit enrollment through attestation, could result in fraudulent enrollment by individuals in substandard products, in the absence of additional substantiation. A regulation vulnerable to such enrollment practices would impair the risk pool in the individual market, and damage the individual market itself. Similarly, permitting enrollment by those eligible for other small group coverage would promote degradation of the risk pool for the small group market.

Codify Absence of State Preemption

The preamble for the proposed rule states, "[t]he proposed rules would not alter existing ERISA statutory provisions governing MEWAs."[18] Moreover, the federalism statement notes that "the proposal would not change AHPs' status as large group plans and MEWAs, under ERISA, the

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[15] Avalere Health, *Association Health Plans: Projecting the Impact of the Proposed Rule* at 3, 5-7 (Feb. 28, 2018), *available at* http://go.avalere.com/acton/attachment/12909/f-052f/1/-/-/-/-/Association%20Health%20Plans%20White%20Paper.pdf.

[16] *Id*. at 6-8; *see also* Letter from Ryan Schultz, Actuary, Oliver Wyman, to Mila Kofman, Executive Director, DC Health Benefit Exchange Authority, on Potential Impact of Association Health Plans in the District of Columbia (Feb. 21, 2018), *available at* https://hbx.dc.gov/sites/default/files/dc/sites/hbx/publication/attachments/Review%20of%20Impact%20of%20AHPs%202.21.2018.pdf.

[17] 83 Fed. Reg. at 629.

[18] 83 Fed. Reg. at 625.

ACA, and State law."[19] We agree that the proposed rule does not raise ERISA preemption issues, and that the existing authority of states to regulate MEWAs will continue undisturbed. The proposed rule in no way limits the ability of states to regulate MEWAs, insurers offering coverage through MEWAs, and insurance producers marketing that coverage to employers. However, the checkered history of MEWAs instructs that unscrupulous actors will try and exploit any change which can be mischaracterized as constituting ERISA preemption. To avoid such malefactors attempting to cloak themselves in this proposed rule, the text of the rule itself, in addition to the preamble, should unequivocally state that nothing in the rule preempts state law and oversight authority regarding MEWAs.

In light of the above, I urge that you withdraw the proposed rule.

Sincerely,

DAVE JONES
Insurance Commissioner

[19] 83 Fed. Reg. at 634.