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Daniel K. Glazier
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Marketplace Assistance Program

March 6, 2018

Office of Regulations and Interpretations,
Employee Benefit Security Administration, Room N-5655,
U.S. Department of Labor,
Constitution Avenue, NW,
Washington, DC 20210

RE: RIN 1210-AB85

Definition of "Employer" Small Business Health Plans

Dear Member of the Employee Benefit Security Administration,

We greatly appreciate the opportunity to comment on the above-cited proposed change of the definition of "Employer" under Section 3(5) of ERISA. Please find our comments on the following pages.

We hope that you will carefully contemplate these suggested considerations. Thank you for your consideration of these comments.

Sincerely,

/s/ Samantha Schrage
Outreach and Enrollment Specialist

/s/ Geoffrey Oliver
Complex Case Attorney

/s/ Lucas Caldwell-McMillan
Managing Attorney

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Office of Regulations and Interpretations,
Employee Benefit Security Administration, Room N-5655,
U.S. Department of Labor,
Constitution Avenue, NW,
Washington, DC 20210

Attention: Definition of "Employer" Small Business Health Plans RIN 1210-AB85.

Dear Member of the Employee Benefit Security Administration,

Thank you for the opportunity to comment on DOL's proposed change of the definition of "Employer" under Section 3(5) of ERISA. Legal Services of Eastern Missouri (LSEM) provides high quality civil legal assistance and equal access to justice for low-income people, seniors and individuals with disabilities in 21 Missouri counties assisting our clients in obtaining access to health care through the Marketplace is one of our priorities. This change is expected to adversely affect our clients by undermining the viability of Marketplace plans and access to plans that offer coverage for all essential health benefits. Therefore, we submit the following comments on the proposed DOL rule change.

The Overview for this proposed rule states that Executive Order 13813 "directs the Secretary of Labor, within 60 days of the date of the Executive Order, to consider proposing regulations or revising guidance, consistent with law, to expand access to health coverage by allowing more employers to form association health plans (AHP)."[1] That executive order stated that "[i]t shall be the policy of the executive branch, to the extent consistent with law, to facilitate the purchase of insurance across State lines and the development and operation of a healthcare system that provides high quality care at affordable prices for the American people".[2]

After reviewing the proposed rule and the history of AHPs it is our opinion that this proposed rule will not facilitate the purchase of insurance across State lines and will likely increase the price of high quality care by siphoning off younger, healthier, and less costly populations into these AHP's which will fail to provide as comprehensive coverage as the plans currently sold through the Marketplace. The likely outcome will be to turn Marketplace plans into a high risk insurance pool, and eventually lead to their collapse.

I) This proposed regulation is not likely lead to implementation of AHPs across state lines due to the complexity of building a network.

[1] Definition of "Employer" Under Section 3(5) of ERISA-Association Health Plans, 83 Fed. Reg. 614 (January 5, 2018).
[2] *Id*.

The proposed rule would allow small business to join together to form one large organization for insurance purposes. The purpose behind this proposed rule is to enable these small businesses to form a larger risk pool that crosses state lines and increases their buying power. This premise is built upon a false assumption that the main obstacle for insurance to cross state lines is regulations. Unlike the proposed rule suggests, the main obstacle for an insurer seeking to enter into a new market or territory is not regulations, but rather, the costs associated with building a provider network using discounted prices.[3]

Under basic insurance principles, discounts are created when insurance companies negotiate with providers who contract to become "in-network" providers with that insurance carrier, often under specific plans offered by that carrier. The discount is then passed along to the consumer who enrolls with that carrier or in that particular plan. While selling insurance across state lines and allowing a consumer's insurance to be used in multiple states sounds good in theory, in reality the idea is incompatible with these very basic principles as well as the business practices of the insurance industry.

Currently, six states allow cross-state insurance sales: Georgia, Kentucky, Maine, Rhode Island, Washington, and Wyoming. However, these laws have yet to result in a single new insurer crossing state lines to offer multi-state plans.[4] According to state officials and insurance industry experts in these states, the main obstacle for new entrants to the market remains establishing a competitive provider network.[5] Additionally, according to a study done by the Center on Health Insurance Reforms, "officials and insurers in all six states noted the complexity of health insurance as a practical barrier to "across state lines" proposals and that establishing the rules under which an interstate health insurance compact would operate would likely demand more time and resources than states are willing to commit".[6] This study only provides further evidence that this idea is impracticable and unlikely to lead to the development of plans crossing state lines or lower premiums for consumers.

If new AHPs are created under this proposed rule they likely to be limited to networks in one state only or even smaller geographic areas. The impact of this limitation is to further divide the existing, in-state, risk pool that feeds into the Marketplace and

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[3] Sabrina Corlette and Kevin Lucia, *Selling Health Insurance Across State Lines is Unlikely to Lower Cost or Improve Choice*; To the Point, The Commonwealth Fund, April 5, 2017, available at http://commonwealthfund.org/publications/blog/2017/apr/selling-health-insurance-across-state-lines.

[4] *Id*.

[5] *Id*.

[6] Sabrina Corlette, Christine Monahan, Katie Keith and Kevin Lucia, *Selling Health Insurance Across State Lines: An Assessment of State Laws and Implications for Improving Choice and Affordability of Coverage*, The Center for Health Insurance Reforms, Georgetown University Health Policy Institute, October 2012, p. 2, *available at* https://www.rwjf.org/content/dam/farm/reports/issue_briefs/2012/rwjf401409.

increase the overall cost of more comprehensive plans in that state. This is likely to be especially burdensome for individuals who need more comprehensive coverage due to pre-existing conditions.

II) The proposed regulation undermines Essential Health Benefits and important protections in the Affordable Care Act.

The proposed rule would also undermine protections created by the Affordable Care Act (ACA). As noted in the proposed rule, the health insurance premium rules that prohibit issuers from varying premiums except with respect to location, age (the 1 to 3 ratio), family size, and tobacco use (within certain limits) only apply to the individual and small-group markets.[7] The proposed rule would allow AHPs to group together to self-insure or purchase large group health insurance, thus skirting these consumer protections and leaving room for discrimination on other bases.[8] According to the National Association of Insurance Commissioners (NAIC) in coordination with the Center for Insurance Policy & Research, interstate sales would allow some insurers to cherry-pick the best customers by avoiding consumer protections that require them to cover individuals with preexisting conditions and limit their ability to charge higher prices for older, sicker customers.[9] We expect that the cherry picking would also occur even if the plans *don't* cross state lines. Notably, it's stated plainly in the language of the DOL's proposed rule itself that "expanding access to AHPs will allow more small businesses to avoid many of the PPACA's costly requirements."[10] By enacting this regulation many small businesses would be allowed to return to the pre-ACA days of providing skimpy, non-comprehensive coverage to employees. This will cause costs to the market as a whole to soar because non-covered services will then still likely be provided by providers to consumers without the necessary coverage. These so called "costly requirements" that the administration wants to avoid are in fact basic consumer protections that enable consumers to have decent, affordable health insurance. The evasion of these protections through the proposed rule would especially harm the low-income clients of LSEM and other legal aid programs.

The ACA also requires that essential health benefits, or EHBs, be covered under most plans. As predicted by the NAIC, insurance policies would cover less and less, as insurers try to design polices that discourage the sickest customers from applying.[11] The practice of selling these new AHPs creates an issue with existing risk pools. The new AHPs would have the ability to entice healthy enrollees away from existing risk pools

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[7] *See supra* note 1, at 618, also at FN 10.
[8] Corlette *supra* note 6, at. 4.
[9] *Interstate Health Insurance Sales: Myth vs. Reality*, National Association of Insurance Commissioners & The Center for Insurance Policy and Research, *available at http://www.naic.org/documents/topics_interstate_sales_myths.pdf.*
[10] *See supra* note 1, at 615.
[11] *See supra* note 9.

and into skimpier plans. The impact of this is that the existing plans would become progressively sicker and more expensive until they eventually collapse.[12] Furthermore, these AHPs also have the ability to create problems for insurers who currently comply with robust state consumer protections, where applicable, as these companies would be lured into using any method available to them to evade these rules in order to remain competitive.[13] Through the evasion of important federal as well as state consumer protections, the new AHPs established under the proposed regulation will create myriad problems which are likely to drive up premiums for existing consumers and result in less comprehensive choice options for those who remain in the risk pool.

III) The proposed rule interferes with the sovereign authority of states to regulate insurance.

The regulation would also create obvious federalism issues regarding the very regulation of insurance. If the regulation does successfully promote Interstate insurance sales, it is likely to create a "race to the bottom" by allowing insurance companies the choice of their regulator.[14] Insurance companies are profit-making entities, and, as such, will seek those regulations which allow them to most emphatically select the healthiest risk.[15] This practice undeniably undermines a state's sovereign authority to regulate the insurance policies sold in its own state.

If this proposed rule were implemented, states could lose regulatory authority over insurance policies. Many state regulators are understandably averse to surrendering some or all authority to enforce state standards by taking the gamble of allowing a different state to institute and enforce consumer protections which affect their residents.[16] Another federalism concern with proposed regulation is that even when authority is plainly established, it is hard to foresee whether a primary state would truly have the ability to enforce its regulations and provide protections to consumers in *other* states.[17] This creates confusion for consumers as well, who are unlikely to be aware of where their policies are actually being regulated, and on whose authority. As it stands currently, consumers often face confusion with the process of appealing a decision by an insurance company, and where to properly file an appeal, be it with the insurance carrier itself, or the state department of insurance. Enacting the proposed rule only creates further confusion by adding a level of doubt for consumers when trying to properly file an appeal or complaint regarding their policy.

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[12] *Id*.
[13] *Id*.
[14] *Id*.
[15] *Id*.
[16] Corlette *supra* note 6, at. 12.
[17] *Id*.

By creating a question as to which states have regulatory authority and, effectively taking power away from the states where insurance is being sold but regulated elsewhere, the proposed rule creates confusion for both regulators and consumers alike.

IV) Fraud

Although AHPs have been in existence for some time, one reason they are not very popular with consumers is persistent and widespread fraud among these associations. Many of these associations have defrauded their members and left millions in unpaid claims when insolvency occurred.[18] The proposed rule itself acknowledges such fraud, noting that some associations "have failed to pay promised health benefits to sick and injured workers while diverting, to the pockets of fraudsters, employer and employee contributions from their intended purpose of providing benefits."[19] By lowering the bar for AHP formation, the proposed rules makes it even easier for would-be scammers to more easily establish and quickly expand across state lines.[20]

V) Conclusion

If enacted, this proposed rule will have multiple negative impacts to our clients. For those eligible to enroll in an AHP it will create greater risk of exposure to fraud; while increase confusion among consumers regarding where they appeal determinations or get assistance regarding fraudulent activity by their plan. Furthermore, for those individuals who either can't enroll in these AHP's or whose AHPs fail to provide the EHBs they need to maintain their health will be subject to higher premiums and the possible collapse of Marketplace plans due to the change in the risk pools.

Thank you for your attention to our comments. If you have any questions or need any further information, please contact Geoffrey P. Oliver, Attorney, Marketplace Assistance Program (800) 444-0514.

Joel Ferber, Lucas Caldwell-McMillan, Geoffrey P. Oliver and Samantha Schrage

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[18] Katie Keith, *The Association Health Plan Proposed Rule: What It Says And What It Would Do*, Health Affairs Blog, *available at* https://www.healthaffairs.org/do/10.1377/hblog20180104.347494/full/.

[19] *See supra* note 1, at 617.

[20] Kevin Lucia and Sabrina Corlette, *Association Health Plans: Maintaining State Authority Is Critical to Avoid Fraud, Insolvency, and Market Instability*, To the Point, The Commonwealth Fund, Jan. 24, 2018, p. 1, *available at* http://www.commonwealthfund.org/publications/blog/2018/jan/association-health-plans-state-authority.