

To: National Association of Insurance Commissioners (NAIC)

From: NAIC Consumer Representatives

Date: February 1, 2018

RE: Concerns about the Federal Proposed Rules Related to Association Health Plans

The undersigned NAIC consumer representatives are deeply concerned about the impact the proposed federal rules on Association Health Plans (AHPs)¹ could have on consumers across the country, as well as on state regulators' ability to control how these plans operate in their markets and to protect consumers from a fresh crop of bad-actor AHPs. The proposed rules would expand the opportunity for unlicensed entities to operate in competition with state-licensed insurers and exempt AHPs from many standards and consumer protections that would apply if the coverage was offered in the traditional state-regulated individual and small-group markets. As the NAIC and individual state insurance commissioners prepare comments to the federal government on this proposal, we urge you to take the following considerations into account.

- **The proposed rules would allow AHPs to proliferate across the country, opening the door to fraud, abuse, and insolvencies.** The proposed rules lower the bar for forming an AHP, making it easier for fly-by-night associations to set up shop solely to sell health insurance, to quickly expand their membership (including to self-employed individuals), and even extend across state lines. AHPs have a long history of fraud and financial insolvency, so their expansion ultimately leaves consumers at significant financial risk, as they may face large unpaid claims for their health care or evaporating insurance coverage when their AHP goes bust.² While the proposed rules suggest states would continue to have authority to impose reserve standards and other financial requirements on these new AHPs, historically promoters have used ERISA preemption as a shield and challenge state oversight in court. We fear that state regulators seeking to assert oversight will be challenged in court, stretching valuable and limited state resources, and that while court cases get resolved, scams will continue to harm consumers.
- **The proposed rules threaten state regulation of insurance.** The preamble to the proposed rules asserts that the DOL “would not alter existing ERISA statutory provisions governing MEWAs... (and) also would not modify the States’ authority to regulate health insurance issuers or the insurance policies they sell to AHPs.” (AHPs in the proposed rules are described as one type of MEWA, or multiple employer welfare arrangement.) However, we are concerned that state attempts to regulate (for example by applying small-group rating rules or essential health benefits standards to AHPs) could be limited if they are found to be inconsistent with the federal approach. The proposed rules do not say whether a state can continue to apply the state small-

¹ “Definition of ‘Employer’ Under Section 3(5) of ERISA—Association Health Plans,” Department of Labor, Federal Register, Vol. 83, No. 4, January 5, 2018.

² Kevin Lucia and Sabrina Corlette, “Association Health Plans: Maintaining State Authority is Critical to Avoid Fraud, Insolvency, and Market Instability,” Commonwealth Fund, January 24, 2018.
<http://www.commonwealthfund.org/publications/blog/2018/jan/association-health-plans-state-authority>

group and individual market standards to an association that would now be considered a large group.

DOL also points to its authority to exempt AHPs, individually or by class, from state insurance regulation. The proposed rules note that “some stakeholders” want DOL to use this exemption authority, and requests comment on the issue. Those advocating for an expansion of AHPs likely want the final rules to make it clear that if associations operate in multiple states, then they will not be subject to different standards in each of those states. Given the importance of state regulation and oversight of AHPs and AHPs’ history of fraud and abuse, we strongly urge the NAIC and state insurance commissioners to oppose any effort in the final rule to preempt states. The mere fact that this possibility is being raised should be of concern.

In addition, President Trump has said he wants associations to be available across state lines, and the proposed rules would allow for that, whether the AHP is based on geography or industry.³ The NAIC has long opposed efforts to force states to accept plans from “across state lines” that compete against traditional state insurance markets and undermine states’ regulatory authority and ability to serve their residents. No matter what assurances might be provided in the final rules about states’ regulatory authority, we fear they won’t be meaningful and that states that attempt to create a level playing field, establish standards for who can form an AHP, or take additional actions to protect consumers would all risk DOL exemptions or legal challenges that result in the preemption of state law.

- **AHPs would have numerous ways to structure benefits, eligibility, and marketing in ways that discriminate against people with pre-existing medical conditions, who are older, and who are female.** The proposed rules include an important attempt to protect people from discrimination by AHPs, by ensuring AHPs cannot reject enrollees or set their premiums based on health factors. While this is a critical provision, and should be retained in the final rules, it is far from sufficient to protect consumers.

The proposed rules, as drafted, leave ample room for AHPs to structure eligibility rules, benefit designs, and marketing practices in ways that encourage enrollment by healthier individuals and groups while discouraging less healthy people and groups. For example, an AHP could avoid covering certain benefits (such as specialty drugs or mental health care) and could charge far higher premiums to people who are older, female, or who work in professions or live in neighborhoods that are deemed high-risk because AHPs are exempt from many of the federal standards and consumer protections that apply to small-group and individual market plans. People who enroll in an AHP could find they don’t have coverage of benefits they need, or that they must

³ Margot Sanger-Katz, “Remember Trump’s Pitch on Health Care Associations? Now We Know What He Meant,” New York Times, January 5, 2018. <https://www.nytimes.com/2018/01/05/upshot/remember-trumps-pitch-on-health-care-associations-now-we-know-what-he-meant.html>

pay large amounts out of pocket for their medical care. People and small businesses that want comprehensive coverage in the individual and small-group insurance markets could find their options dwindling or that the premiums are unaffordable.

The disparity in rules also has implications for states' small-group and individual insurance markets. As the American Academy of Actuaries has noted, "AHPs could create adverse selection concerns if they operate under different rules...The viability of many state-based markets would be challenged as a result."⁴ As healthier people and groups shift to AHPs, premiums are likely to rise and insurer participation could falter in states' traditional markets, ultimately endangering access to comprehensive benefits for millions of people and small businesses over time.

We therefore urge the NAIC and individual insurance commissioners to comment to the federal government on the harm the proposed rules are likely to cause and to continue working to ensure that you can protect consumers in your states. We also urge you to underscore the importance of providing states with some lead time to prepare if these rules, or some version of them, are finalized. If the federal government's intention is to ensure that states can truly retain authority over AHPs, then states will need time prior to the resurgence of AHPs to review current state laws that might apply to AHPs, consider how AHPs might affect their insurance markets, identify any gaps in the regulatory framework or oversight process, and prepare to monitor and oversee the AHP market within their borders. Some states may decide they want to pass legislation, issue new regulations in order to establish new standards for AHPs (regarding benefits, rating, marketing practices, and/or financial reserves), issue guidance to their regulated entities, and undertake robust consumer education efforts. Therefore, we urge the NAIC and state insurance commissioners to request that the effective date of the final rules be set at least three years from the time they are issued, to give states and their legislatures time to consider and act in this area. Thank you for your consideration.

Sincerely,

Amy Bach
Ashley Blackburn
Bonnie Burns
Lucy Culp
Deborah Darcy
Marguerite Herman
Anna Howard
Betsy Imholz

Debra Judy
Katie Keith
Amy Killelea
Peter Kochenburger
Sonja Larkin-Thorne
Michelle Lilienfeld
Sarah Lueck
Lincoln Nehring

Brendan Riley
Matthew Smith
Andrew Sperling
Harper Jean Tobin
JoAnn Volk
Silvia Yee

⁴ "Issue Brief: Association Health Plans," American Academy of Actuaries, February 2017.
<http://www.actuary.org/content/association-health-plans-0>