



National Association of Insurance  
and Financial Advisors

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

**Re: Definition of Employer – Small Business Plans, RIN 1210-AB85; 29 CFR  
Part 2510**

This letter provides comments from the National Association of Insurance and Financial Advisors (NAIFA) on proposed regulations to amend section 29 CFR Part 2510.

Founded in 1890 as The National Association of Life Underwriters, NAIFA is the oldest, largest and most prestigious association representing the interests of insurance professionals from every Congressional district in the United States. Our mission – to advocate for a positive legislative and regulatory environment, enhance business and professional skills, and promote the ethical conduct of its members – is the reason NAIFA has consistently and resoundingly stood up for agents and called upon members to grow their knowledge while following the highest ethical standards in the industry.

NAIFA generally supports proposals that aim to increase consumer choice, lower premiums, and foster greater competition in the health insurance market for both individuals as well as large and small groups. In an effort to achieve these goals, the Department of Labor (DOL) produced a proposed regulation with the purpose of facilitating the ability of small employers to form an association health plan (AHP) to obtain health insurance in the large group market. As the DOL explains in its overview of the proposed regulation, such an option may provide a beneficial and cost efficient option for small employers especially as large group plans are not subject to certain mandates and requirements of the Affordable Care Act (ACA).

However, encouraging the growth of AHPs raises a number of concerns such as possible adverse selection in the health insurance risk pools, insufficient solvency standards to ensure AHP stability, and oversight of cross-state selling of health insurance coverage. NAIFA directs its comments towards these specific concerns in our comments below.

**Adverse Selection in the Health Insurance Risk Pools**

As the DOL indicates, ERISA generally classifies AHPs as a type of multiple employer welfare arrangement (MEWA). A long-standing concern that NAIFA has had with MEWAs, and

similarly structured AHPs, is that these vehicles may encourage the plan sponsor to selectively determine which individuals may participate in the group plan which could result in unbalanced risk pools in the small group and individual markets as healthier individuals choose to join an AHP. Older and unhealthier consumers may therefore be forced to seek coverage in the individual market where premiums would likely be higher due to an unbalanced risk pool.

To address this possibility, the DOL proposes to include a nondiscrimination provision in 29 CFR Part 2510 to prohibit such potential adverse selection that would disallow an AHP from declining enrollment in the plan to a member based on health factors. More precisely, under the draft regulation, the AHP may not condition a member's eligibility in the plan or determine premiums based on health status. Further, the DOL proposal specifically states that the AHP must not restrict participation in the group health insurance coverage plan due to any individual's health condition per the ACA's health nondiscrimination rules. In proposed new section 29 CFR Part 2510.3.5(d)(1), the DOL proposes to add the following text: “

*(1) the group or association must not condition employer membership in the group or association based on any health factor of an employee or employees or a former employee or former employees of the employer member (or any employee's family members or beneficiaries), as defined in 2590.702(a) of this chapter.”*

NAIFA believes this proposed language could be an important measure in ensuring stable risk pools by reducing the possibility of adverse selection.

## **Solvency Standards**

Another area of concern NAIFA has with MEWAs and AHPs, especially those that are self-insured, is the possibility that these operations may not be subject to state-level solvency standards and reserving requirements that apply to fully insured group insurance plans offered by insurance carriers. Unfortunately, some self-insured MEWA plans have a troubled history. During the late 1980s and early 1990s, some MEWAs went bankrupt and left hundreds of thousands of people with unpaid medical bills due to MEWAs not being sufficiently capitalized or properly managed. We argue that such results were the consequences of insufficient solvency regulation.

To prevent such abuses, it is critical that these entities – whether they are self-insured or fully-insured – remain subject to state solvency requirements to ensure their financial viability and, ultimately, to protect policyholders. Lack of stringent solvency standards and state regulatory oversight may leave MEWA beneficiaries with an empty promise of coverage after incurring medical services. It is therefore important for the stability of the MEWAs, AHPs, and the health insurance markets generally that states retain their authority to regulate the solvency of AHPs. The DOL clarifies that the proposed rule would not alter state authority to regulate AHP group insurance plans:

*“The proposed rules would not alter existing ERISA statutory provisions governing MEWAs. The proposed rules also would not modify the States' authority to regulate health issuers or the insurance policies they sell to AHPs. As described above, some*

*MEWAs have historically been unable to pay claims due to fraud, insufficient funding, or inadequate reserves. ERISA section 514(b)(6) gives the Department and State insurance regulators joint authority over MEWAs (including AHPs described in this proposed rule), to ensure appropriate consumer protections for employers and employees relying on an AHP for healthcare coverage.”*

We appreciate that the DOL acknowledges in its overview of the proposed regulation that the DOL does not have authority under ERISA to exempt such MEWAs from state insurance laws that apply to fully insured MEWA plans, especially from state insurance laws that set required reserve levels. However, the DOL also requests comments regarding potential exemptions for AHPs from certain ERISA requirements and also solicits suggestions on how the DOL could utilize ERISA Title I to regulate and ensure the solvency of AHPs. NAIFA urges the DOL to give very cautious consideration to any proposal that may allow AHPs, especially those that are self-insured, to obtain a federal exemption from state insurance laws. NAIFA strongly believes that state insurance laws should continue to apply to self-insured plans to ensure that AHPs are solvent and can pay promised benefits to policyholders.

### **Cross-State Selling of Health Insurance Coverage**

The DOL proposal appears to permit cross-state selling of insurance sales with modifications to the “commonality of interest” requirement by establishing two criteria for employers to join or form an AHP. Under the DOL proposal, employers must be in the same trade, industry, line of business or profession, or, alternatively, must reside in the same state or metropolitan area which may span multiple states. In both instances, sales of health insurance would span across state boundaries.

While NAIFA supports efforts to make health insurance more available and more affordable, we have concerns about how such a proposal will be implemented. In our view, a cross-state selling system raises a series of issues that the proposed regulation does not yet address. Clarification is needed in the proposed regulation to determine which state’s insurance laws would govern such matters as policy pricing, licensing of companies and agents and brokers, solvency standards, consumer protections, and other matters. Close financial oversight by each state’s insurance regulator has helped protect the consumer purchasing financial protection from catastrophic health care expenses. This type of oversight may be compromised under proposals to allow the sale of health insurance across state lines unless multiple state regulatory issues are addressed. We therefore urge the DOL to consider these issues before issuing the regulation in final form.

As noted above, NAIFA commends the DOL for producing a proposal intended to ensure that consumers have greater choice and affordable options in the health insurance market. We hope that the final rule addresses the concerns we have raised in this letter. We thank you for your time and consideration of our views. Should you have any questions, please contact Steve Kline in the NAIFA Government Relations office at [skline@naifa.org](mailto:skline@naifa.org) or (703) 770-8187.

Sincerely,

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