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Small Business Majority ☞ Young Invincibles

March 6, 2018

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

Attention: Definition of Employer – Small Business Health Plans | RIN 1210—AB85

Dear Sir/Madam:

Health Care For All New York (HCFANY) respectfully submits the following comments to the Department of Labor (DOL) in response to the Notice of Proposed Rulemaking (NPRM) released on January 5, 2018.

HCFANY is a statewide coalition of over 170 organizations dedicated to achieving quality, affordable health coverage for all New Yorkers. We strive to bring consumer voices to the policy conversation, ensuring that the concerns of real New Yorkers are heard and reflected. We also provide policy analysis, advocacy, and education on important health policy and coverage issues that affect New Yorkers around the state. For more information on HCFANY, visit us on the web at www.hcfany.org.

HCFANY appreciates the opportunity to provide comments on the proposed rule. Many of the proposed changes would make it more difficult or costly for consumers to get health insurance by drawing younger, healthier consumers out of the individual or small groups risk pools and into association health plans (AHPs). If adopted, the effect of the NPRM would destabilize New York's health insurance market. Many of the proposed changes would also weaken or eliminate health insurance protections for consumers transitioning to AHPs under the NPRM. HCFANY strongly recommends leaving existing rules and interpretations in place with regard to AHPs and that states be able to maintain regulation and oversight of AHPs.

States must retain authority to regulate Multiple Employer Welfare Arrangements (MEWAs). The NPRM raises questions about the preemption of state laws. HCFANY strongly opposes preemption of state laws and would consider any attempt by the DOL to preempt states through this rulemaking an usurpation of Congressional authority.



Although the NPRM states that the proposed rules do not alter existing ERISA statutory provisions governing MEWAs, HCFANY is 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.

HCFANY therefore urges the DOL to clarify that ERISA single employer AHPs, including those that cover more than one state, would have to comply with all state laws of the states in which they operate and continue to be subject to state oversight and regulation. This will both maintain state flexibility as well as each state's ability to protect consumers from the potential ramifications of fraudulent or insolvent AHPs, and to manage their insurance markets.

There will be a detrimental impact on New York's individual and small group insurance markets if state regulation is preempted. The proposed rule seeks to allow small employers and self-employed individuals to band together for the sole purpose of enrolling in health coverage and to exempt AHPs from states' rating rules. This would cause an exodus of healthy individuals from the individual market looking for cheaper premiums in AHPs, which would be detrimental New York's individual market. Premiums in the individual market likely would skyrocket back to the \$1,200 per member per month prices of the pre-ACA days, and a classic death spiral would ensue where only the sickest individuals would remain in the risk pool. This would result in less consumer choice, less affordability, a higher uninsured rate, and an increased burden on safety-net hospitals that provide care for the uninsured.

Sales across state lines will harm consumers and New York's individual and small group insurance markets. The NPRM seeks to permit AHPs to be available across state lines.¹The interstate sale of AHPs would undermine states' regulatory authority and their ability to serve residents. Moreover, a "race to the bottom" likely would result, with AHPs delivering policies in states with the least amount of regulation to consumers across the country. New York's consumers could unwittingly enroll in health plans with narrower benefits and less protection for consumers. This is particularly detrimental in New York where consumers enjoy some of the strongest protections in the country.

The nondiscrimination rules are not adequate to protect consumers and will impact New York's individual and small group insurance markets. The non-discrimination provisions of the proposed rule are insufficient to protect consumers. The NPRM, 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 those who are less

¹ Margot Sanger-Katz, "Remember Trump's Pitch on Health Care Associations? Now We Know What He Meant," New York Times, January 5, 2018, available at <https://www.nytimes.com/2018/01/05/upshot/remember-trumps-pitch-on-health-care-associations-now-we-know-what-he-meant.html>.



healthy. For example, an AHP could avoid covering certain benefits, such as specialty drugs or mental health benefits, in order to discourage unhealthy risk.

The disparity in rules also has implications for states' individual and small group 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."² As healthier individuals and small groups shift into AHPs, premiums are likely to rise and insurer participation could falter in New York's traditional markets. This would ultimately endanger access to comprehensive benefits for millions of people and small businesses.

Recommendation: HCFANY strongly recommends leaving existing rules and interpretations in place with regard to AHPs and that states be able to maintain regulation and oversight of AHPs.

Thank you for the opportunity to provide comments on the Notice of Proposed Rulemaking. If you have any questions about our comments, please contact Taylor Frazier at tfrazier@cssny.org.

Very truly yours,

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² "Issue Brief: Association Health Plans," American Academy of Actuaries, February 2017, *available at* <http://www.actuary.org/content/association-health-plans-0>.