



The Word & Brown Companies

March 6, 2018

The Honorable R. Alexander Acosta  
Secretary of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210

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

Dear Mr. Secretary Acosta:

The Department of Labor's (DOL) proposed new rules on Association Health Plans (AHPs) will create an entirely new model for small group health insurance and for 'working employer' individual health insurance in America. Careful consideration needs to be given to the final rules in that the AHP small group and 'working employer' market will run in parallel to existing small group and individual health markets.

We appreciate the DOL's interest in reviewing comments from impacted industries and others to ensure that in the development of the new AHP market we follow the medical maxim of 'first, do no harm'. With that in mind, Word & Brown submits these comments in our desire to both help ensure a successful AHP market launch while retaining a stable small group market.

Our Orange, CA based company has two primary units: our Word & Brown General Agency (GA) and CHOICE Administrators. Our GA is a small group health quoting and marketing resource for over 10,000 independent, licensed insurance agents, and assists agents in developing health insurance proposals for well over 45,000 small businesses a year. In 1996 CHOICE Administrators launched the California Choice small group health insurance private exchange. It is now the largest small group private exchange in the country, currently administering coverage for nearly 19,000 small businesses.

Based on this in-depth level of hands-on small group expertise, we will focus our comments on the small group impacts of AHP rules and allow those with greater knowledge of the individual market to comment on possible working employer issues.

Our comments focus on two interrelated subjects: AHP market impact and AHP regulation. Since these issues are so closely connected, we offer one suggested single solution that addresses both areas.



### **AHP Market Impact:**

Despite the turbulence in the post-ACA individual market, the small group market has remained stable and resilient. Premium increases have been incremental, carrier participation and competition remains vibrant, provider networks are robust, and innovations in benefit design have flourished. In response, the past downtick in the percentage of small employers who offer coverage has turned around and a welcome uptick has been documented. In short, it is a market that is working and that is serving its purchasers and consumers well.

AHPs, due to the proposed changes to the ERISA definition of employer, would create a parallel market for small employers that would be absent the protections otherwise afforded by the small group market rules.

Under the proposed rules, AHPs will be able to band together otherwise unrelated small employers under large group contracts to offer coverage selectively on the basis of geography or industry. Without proper safeguards, this will have an adverse impact on insurance market stability for non-AHP small groups. For example:

1. Geographically-based AHPs could cater to upper income, more highly-educated zip codes and avoid lower-income, inner-city areas with lower levels of college-educated residents. Studies have shown a correlation between income, education, and health.

Another unanticipated impact of AHP zip code gerrymandering could be to offer coverage in better risk suburban areas and avoid rural areas whose limited provider options can lead to higher costs.

Alarming, an AHP might easily be tempted to avoid the rural communities in America which are currently reeling from the impacts of the opioid epidemic. An AHP actuary might call that plain old-fashioned 'smart underwriting'. We would call that unfair and dangerous policy.

2. Industry-based AHPs would have the advantage of catering to industries known to have either younger employees or better health risk characteristics – practices which are common in large group underwriting but not in small group underwriting. In fact, we see nothing in the proposed rules that would prevent an AHP from forming to attract both geographic and industry-based better risk groups.



More importantly, the parallel market created by the AHP rules would open up a new avenue for ‘gaming’ the system. One pool will likely achieve a better risk mix, causing the less desirable risk mix pool to deteriorate and quickly reach a ‘death spiral’. We have seen what happened in the individual public exchanges as the risk pool grew worse: carriers pulled out, rates skyrocketed, provider panels were stripped down, and consumers were left with poorer health coverage options at higher costs. Great care needs to be taken to ensure that the small group does not suffer a similar fate.

Beyond Standard Industrial Code (SIC)-driven or zip code-driven rating advantages, AHPs eschew certain Essential Health Benefit requirements, the risk adjustment charges and other small group requirements necessary for market stabilization. Large group pricing is generally ‘composite rated’ which will attract younger groups and further lower overall rates for AHP members.

Even when an AHP is offered on a guaranteed issue basis, the added layer of the Association’s by-laws and membership application processes could be used as proxy underwriting tools. For example, by-laws could be developed to both address new and renewal group applications in such ways as to attract and keep better risk for the AHP while driving less health risk to the open market.

The results of destabilization and rate spikes in the non-AHP market will be to reverse the trend of more small groups offering coverage. Such an outcome has the potential to spill literally millions of more Americans onto the already shaky individual exchanges. Coverage quality is likely to suffer and many employees will see their employer premium contributions replaced with tax-payer funded subsidies for individual coverage. The coverage and fiscal impacts of such outcomes would not be positive.

Consequently, we request that you re-consider the very broad proposed changes to the definition of “employer” in ERISA Section 3(5) and instead consider a more narrow definition that would allow small employers to band together as large employers only in extraordinary circumstances. For example, we would propose that only associations formed for reasons other than to provide benefits should qualify as “bona fide”.

**AHP Regulation:**

Insurance has a long and successful history of being largely regulated at both the federal and the state level.

Federal law has built the framework of insurance laws and the states are delegated the power to implement state insurance laws within that framework. State



insurance regulating bodies have acquired expertise to ensure the markets work in a stable and orderly fashion. States have established hotlines for consumer complaints, have carefully reviewed benefit filing requirements, and have fiscal solvency standards and carrier reporting and audit rules in place. These protect the security of the insurance-purchasing American consumer, which is the underlying role of insurance of any kind. And the states have the constitutional right to pass laws that protect its citizens.

A wide variety of state regulations have been developed to address market abuses that were unforeseen. These sorts of rules often were promulgated in response to fraud, insolvency, unfair business practices and consumer complaints.

To ensure proper regulation of AHPs and to prevent small group market destabilization we strongly recommend that the following language be part of the AHP Final Rules:

“Nothing in these regulations should be construed to affect or modify the provisions of Section 2762 of the Public Health Service Act.”

This ensures that the final regulations cannot be construed as limiting that symbiotic relationship between the federal and state laws that was intended by Congress. It also will reduce the exposure to delays the new rules might face should Courts deem a conflict between PHSA the Final Rules.

And since state insurance laws apply to self-funded AHPs per ERISA Section 514(b) to the extent that they are not inconsistent with ERISA, we also believe the addition of the following language in the Final Rules will avert an unanticipated rise of inadequately financed self-funded AHPs:

“The DOL does not believe that the requirements set forth in Section 27 of the PHSA are inconsistent with the terms of ERISA.”

This language will go a long way to avoid confusion about which state insurance laws apply to self-funded AHPs, especially with the ever changing preemption landscape.

Existing state regulatory processes and infrastructure under PHSA Section 2762 would forestall the need for any added federal regulatory resources and processes to adequately protect consumer rights within an AHP. If our proposed language is not adopted, we believe that a replacement federal regulatory process should be included in the final rule that can closely monitor AHP market behavior.



The Word & Brown Companies

**Conclusion:**

We offer the above proposed language for inclusion in the final rule, with supportive reasoning, so that AHP rules will provide both market stability and clarity and do not blur the lines that Congress created between state law and federal law.

Word & Brown does not oppose the development of the AHP model. We think AHPs can play a positive role for 'working employer' individuals who do not qualify for exchange subsidies and who are being priced out of the individual market.

We believe that legitimate associations have a strong role to play in advancing and advocating for the interests of their members. Both small employers and large employers benefit from association membership through the education, advocacy, training and other services that associations have proven adept at delivering.

If an association, whether existing or newly formed in response to AHP rules, offers a health program, that health plan should conform to the market protections inherent in the balance of the market. This will provide the AHP market with the supportive, state-based regulatory framework to foster a successful AHP environment without disrupting the current stability of the small group market.

Thank you for the opportunity to submit comments on the proposed DOL change to the ERISA definition of employer. Again, we commend the Department for its sustained commitment to expanding access to affordable health coverage.

Please contact me with any questions. Thank you.

Respectfully submitted,

A handwritten signature in black ink that reads "David Duker".

David Duker  
Chief Strategic Officer  
The Word & Brown Companies  
(714) 567-4587  
[dduker@wordandbrown.com](mailto:dduker@wordandbrown.com)

*"Providing Service of Unequaled Excellence"*