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The Honorable R. Alexander Acosta
Secretary of the United States Department of Labor
Employee Benefits Security Administration
Office of Regulations and Interpretations
200 Constitution Avenue, NW
Room N-5655
Washington, DC 20210

**Re: Proposed Amendments to 29 CFR 2510
RIN 1210-AB85
Comments of Insurance Design Administrators**
Via Email: e-ORI@dol.gov

Dear Secretary Acosta,

These comments are submitted by Insurance Design Administrators (IDA), a fully licensed Third Party Administrator of self funded health benefit plans, now in its thirty-fifth year of continuous operations. IDA has been active in commenting upon federal/state initiatives impacting such plans. IDA has been a commentator to prior USDOL NPRMs, an invited guest to USDOL Hearings and has been a contributor on fiscal calculations.

Introductory Statement of Support for the NPRM

IDA welcomes the Department's Association Health Plans (AHP) NPRM proposal.

Having followed the issue of MEWAs, PEOs, staffing companies and AHP initiatives for at least the past 15 years, IDA recognizes the NPRM is a departure from the Department's prior stance – such prior position having been developed for good reason, in light of the documented abuses (referenced at 83 Fed.Reg. 625 and footnote 24, in addition to 83 Fed.Reg. 631 and footnote 51). In recognition of this history and need for safeguards, IDA finds the NPRM substantially addresses those concerns and should open markets as anticipated. In further support of the NPRM, IDA also offers an approach that has had success in New Jersey.

Context – Market Need for AHPs

Aptly stated at 83 Fed.Reg. 617, an amalgamation of combined employers not meeting the definition of a bona fide association has always had the right to seek coverage through traditional, fully-insured means. Thus, the option to do so has existed for years, although the underwriting by carriers has not been enthusiastic. While the NPRM, if adopted, may ease such underwriting (and the suggested additional of a successful approach in NJ would ease it even further), IDA suggests substantial impact of the NPRM will be in the self funded market.

This is because the fully insured MEWA option has always existed, but has not had much traction, forcing medium and small employers to seek coverage on a solo employer basis (and similar premium experience). It is for this reason, at least in IDA's experience, that we have been approached with regularity by employer groups not otherwise meeting a bona fide association status, seeking self-funded coverage options – and due to the current state of the regulations and daunting prospect of seeking approval through the MEWA process, have turned all such inquiries away. The NPRM changes the analysis, and the opportunity.

Context – Legitimacy of Self Funding

And while on the point, the preamble makes an unflattering reference to self funding (at 83 FR 619, Col. 2¹), to which IDA disagrees and wishes to briefly respond.

- First, self funding is fully transparent, with every single cost item being disclosed, in stark contrast to a pay-it-and-lose-it fully insured premium;
- Secondly, the cost of the plan in self funding is pay-as-you-go/only-pay-for-services-actually-received, also in contrast to a fully insured premium;
- Third, such plans are regulated (contrary to common misperception), where at least in NJ, the service vendor TPA is to be fully licensed by the NJDOBI, and its service agreement is required to contain numerous explicit consumer plan protections (in addition to being subject to the full jurisdiction of the USDOL/EBSA);
- Fourth, the function of stop loss insurance serves three vital protections to employers:
 - They are impartial vendors, underwriting the expected risk, thereby adding to the grouping of expert professionals advising the employer;
 - The function of excess loss coverage protects the plan from both individual high claimant (specific coverage) and high expenditures by the group as a whole (aggregate coverage), from impacting the employer's overall operations and solvency;
 - The employer is free to exercise their own risk management in selecting how much the employer will retain per individual before excess-loss applies to a claim (specific coverage).

¹ The Preamble making the statement at 83 Fed.Reg. 619, Column 2: *"In addition, the option for small employers to join AHPs could offer better financial protection to employers (and their employees) than if they self-insured and purchased stop-loss insurance that may not adequately protect them from financial risk."*

As a result, self-funding enables the employer to choose the scope of benefits they want to offer, select their composite vendors, obtain excess loss coverage (after being marketed to numerous venues) to protect against unanticipated loss, while having a fully transparent accounting of all costs. It is hard to imagine a more efficient model, with the employer retaining a full scope of choice while protected by meaningful but unobtrusive government oversight. IDA trusts the Department also shares this viewpoint.

Overview of IDA's Responses to the NPRM

Within the NPRM, IDA observed at least sixteen (16) specific requests for topical comment to the NPRM. Not purporting to be expert in all such areas, IDA nevertheless offers its opinion in ten such areas, three of which offer an extended discussion (Effect of CMS regulations, Filing and Underwriting), one in which a supportive addition is offered (Organizational Requirements), and one wherein clarification is requested (role of state regulation of bona fide AHPs as defined in the NPRM). For ease of reference, IDA's comments are offered in the order in which the topics appear within the NPRM.

Agency Interpretive Discretion (83 Fed.Reg. 616-17)

Within column 1 at page 617, the NPRM states "*... but neither the Department's previous advisory opinions, nor relevant court cases, have ever held that the Department is foreclosed from adopting a more flexible test*". While IDA agrees with the authority of the statement, suggests that merely "departing" from prior interpretations to accomplish the goals of the NPRM would be impractical. Respectfully, the lineage of Advisory Opinions, USDOL Publications, and "Fraud Alerts" highlight the narrow position formerly taken by the Department in defining an "employer" at ERISA (3)(5) and "MEWA" at (3)(40). Given the strong jurisprudence surrounding those interpretations, only the issuance of a new regulation and test (such as proposed by the NPRM and pursuant to the Administrative Procedure Act) can sever the prior understandings and application.

Interplay of CMS Association Plan Coverage Guidance (83 Fed.Reg. 618, column 2)

On September 1, 2011, CMS issued guidance regarding association plan coverage. The goal was to clarify what size a plan was, and as a result, whether individual, small market or large market compliance was required. While CMS recognizes that true associations can exist (where the amalgamated size of the association is considered, rather than the size of each participating employer), the stringency of CMS' test may need coordination with this NPRM.

For example, through the NPRM the Department would recognize an AHP as the aggregate of all underlying employers as being one “employer”, the existing CMS Guidance takes a differing approach which would pierce through the aggregate AHP designation, subjecting all participating employers to the individual, small and large group regulations – thwarting the purpose of the NPRM. Respectfully, despite the USDOL/HHS/Treasury Memorandum of Understanding cited at 83 Fed.Reg. 619, footnote 15 [64 Fed.Reg. 70164], given the disparity of the CMS 2011 Plan Guidance from the proposed NPRM, only a definitive statement of CMS either suspending or amending their 2011 Association Plan Guidance will avoid this result.

Scope of Operations in the Same State or Region (83 Fed.Reg. 619-20)

Within the NPRM, the Department solicits three areas of comment regarding the proposed requirement that an AHP demonstrate its commonality of interest through an alternative test of all member employers being from the same state or metropolitan area. While IDA applauds the concept (finding the OMB designation to be workable), IDA raises a separate issue.

Namely, the AHP also has to observe all formation and operational requirements of the state(s) it conducts business. While not insurmountable (IDA as a TPA having to obtain such state approvals and filings to operate in states other than its home state), a fledgling AHP may find multi-jurisdictional compliance daunting. This is not to deter the proposal, merely to point out the practicality.

Filing for Approval (83 Fed.Reg. 620, Column 1)

Within the discussion of scope of AHP operations, the Department inquires whether there is benefit to seeking Department approval/certification that all members are within an (approved) metropolitan area. IDA endorses the basic comment – with a suggested modification.

Namely, it once was required for all ERISA plans to register with the USDOL, receiving a certification and Plan ID Number in return. This process was repealed by the Taxpayer Relief Act, P.L. 105-34, §1503 (See, former 29 U.S.C. §1024 (setting forth the prior requirement of DOL filing). While an administrative saving to plans not having to file, and the USDOL not having to catalogue, it nevertheless has caused a verification problem.

To explain, in a the common circumstance where the identity of a plan as being self funded rather than fully insured is being questioned, the “proof” of self funded ERISA status is by the default on not being fully insured. The form 5500 filing is helpful, but is suffers from being self-reported and un-audited. The lack of an affirmative certification from the USDOL has been problematic.

Seeing that AHPs will be a new entity, and one that the Department is cautious to prevent marketing abuses (as well as to avoid state/federal jurisdictional confusion), the benefit of a formal registration as an AHP would have a distinct benefit. Thus, a filing/registration process wherein the AHP receives proof of filing/registration is strongly recommended. Although beyond the scope of this NPRM, IDA also requests the Department consider re-implementing a registration/filing certification process for other plans all to address the verification gap outlined above.

Organizational Structure and Controlled by Employer Members (83 Fed.Reg. 620)

The NPRM requires that the AHP have a formal organizational structure, complete with by-laws wherein the group or AHP members control the AHP functions and activities. The provision exists to ensure that it is the AHP members (rather than a carrier) actually run the AHP, thus preserving the requirement of ERISA 3(5) that the association must act “in the interest of” the direct employers in relation to the AHP.

IDA applauds this requirement, but points out the NPRM only requires by-laws to the extent they are “... *appropriate for the legal form in which the group or association operates...*”. As drafted, there is the potential that only the bare-bones template by-laws necessary to establish a legal entity will occur – and not those as tailored to the actual operations of a health plan. To this end, IDA offers a successful model from its experience in New Jersey through “Joint Health Insurance Funds” or HIFs.

In context, while such HIFs address government entities (thereby excluded from ERISA’s jurisdiction as per ERISA 3(32) and 4(b)(1)), and as regulated by the New Jersey Department of Banking and Insurance (NJDOBI), the structure offers an approach to many issues raised in the NPRM. Namely, HIFs address membership, adverse selection and many other related issues. In further context, IDA obtained the first HIF approval issued in approximately 20 years (September 22, 2014). From this experience, IDA encourages the Department’s consultation with this standard, pointing out seven highlights that may benefit the development of AHPs.

- Source: N.J.Pub.L.1990,C 372, codified at NJSA 40A:10-36, et. seq., and NJAC 11:15-3.1, et. seq.
- Initial membership requirement of at least 2 founding entities and minimum number of covered lives (NJAC 11:15-3.6(b)(9)(vi)). Adoption of a minimum lives requirement would stabilize start up AHPs by requiring an actuarially sound base. Otherwise, it is theoretically possible that an AHP could be comprised of 2 solo proprietors.
- The completion of a Feasibility Study prior to commencing operations, wherein an actuary has reviewed the pro forma budget and first year’s proposed assessments, opining the projections are actuarially sound (NJAC 11:15-3.6(b)(9)). By comparison, without any pre-market entry review, any entity could offer AHP benefits without consultation or regulatory filing.

- An initial term of membership of three years and be renewable (NJAC 11:15-3.3(a)). Such an initial term binds member employers to the Plan, thwarting annual rate shopping/spreadsheets/dis-enrollment – leading to further cohesiveness among the participating employers.
- Use of By-Laws which each employer must adopt (NJAC 11:15-3.6(a) & (b)), addressing issues including: membership, termination and withdrawal of members (11:15-3.10); general operations (11:15-3.4(a-e); Fund Officers and roles (NJSA 40A:10-37-38); budget adoption (11:15-3.4(f)); member assessments and supplemental assessments (11:15-3.15); establishment and maintenance of four fiscal accounts (11:15-3.13); investments (11:15-3.19); disbursements (11:15-3.18 -21); refunds and reserves (11:15-3.20); claims handling procedures and confidentiality (11:15-3.6(e)(16-17)); and dissolution (11:15-3.12).
- Use of a Trust and Indemnity Agreement (NJAC 11:15-3.2) wherein each member agrees to jointly and severally assume discharge the liabilities of each member of the Plan for the period in which they were a participating member. Such a condition of participation binds employers to the liabilities of the Plan, eliminating issues of fact and law regarding departing members (such liability disputes often being at the center of the MEWA funding failures documented in the NPRM).
- Use of a Risk Management Plan adopted into the By-Laws (NJAC 11:15-3.6(d)) wherein 23 items are to be addressed, including the risk being underwritten, use of excess loss coverage (if any), contribution sources, initial and renewal rating methodologies.
- Use of a Trust Account expressly for the benefit of enrollees (NJAC 11:15-3.6(b)(6)). An obvious protection that may not otherwise be obvious to start up AHPs and medium sized employers who have previously used general asset funding (not requiring use of a trust).

Eligibility: Limited to Defined Employees and Working Owners (83 Fed.Reg. 620-22)

The NPRM proposes that eligibility be limited to employees and working owners. To prevent sham de-minimus showings of commercial activity (adequately described at 83 Fed.Reg. 622, column 2), the NPRM proposes an hours test (30 hrs week/120 hours per month) or that earned income from the commercial activity qualifying them to participate in the AHP is at least equal to the cost of the coverage being sought. Further, the NPRM suggests in order to qualify for AHP enrollment, the individual applicant cannot be eligible anywhere else for coverage.

These two eligibility proposals are thoughtful, tailored to prevent adverse impact upon other coverage sources, and to ensure a bona fide employment based nexus to the coverage.

IDA expresses reservations, however, regarding the hours requirement, particularly for start-ups. Under such circumstances, proprietors are often working at other employment to support the budding venture – and the hours may be sporadic and difficult to quantify, let alone document. An attestation from the Proprietor/Employer is essential, but may not (yet) be in a position to have set up its state/federal withholding, workers compensation and related accounts (which may all serve as surrogates of proving a bona fide commercial venture and hours worked).

This concern diminishes once the entity is actively employing anyone other than the Proprietor, wherein upon initial application and semi-annually or annually thereafter, a provision by the employer to the AHP of the enrollees' withholding statements could document full time employment status. Further clarification from the Department on these issues will be helpful.

Eligibility: No-Other-Source of Coverage Provision (83 Fed.Reg. 622, Column 1)

The NPRM proposes that in order to be eligible for AHP coverage, the individual cannot be eligible for any other group coverage sponsored by their own employer or by the spouse's employer. Clearly, the proposal is designed to combat flight from other coverage sources, as well as to protect the fledgling AHP plan from adverse enrollment. However, the proposal may have unintended adverse consequences.

As drafted, the provision will disqualify substantial numbers of applicants for AHP coverage who have a working spouse. This will occur as employer plans covering the spouses are generally required to offer compliant coverage under PPACA (but despite PPACA's permission to exclude spousal coverage, few do so). Further, as drafted, an interpretation could be made that the no-other-source of coverage exclusion also applies to AHP applicants under the age of 26 (who would be eligible for group coverage through plans in which their parents participated). Therefore, the protection the proposal seeks to provide may be out-weighted by the scope of disqualification it will cause. IDA suggests eliminating this requirement, or making it permissive within the AHP's discretion to adopt.

Non-Discrimination Proposals (83 Fed.Reg. 623-24)

The NPRM identifies two classifications of (non) discrimination: non-discrimination proposals themselves and underwriting practices. Four areas of comment are solicited. First and foremost, IDA agrees with the Department that the existing non-discrimination provisions of HIPAA/PPACA must be applicable to AHPs. However, IDA suggests re-visiting the underwriting proposals of the NPRM as outlined in the next section.

Underwriting Protections (83 Fed.Reg. 623-24)

The NPRM expresses reservations regarding the ability of an AHP to set a different rate among participating employers, finding the practice discriminatory as an improper consideration of health status (See also, 83 Fed.Reg. 635 and proposed 29 CFR 2510.3-5(d)(5), Example 4). Several practicalities are worthy of mention:

- Original underwriting. At inception, the composition of the AHP will be underwritten for the anticipated enrollment and understood risk(s). In both the self funded and fully insured context, this rate is set for a defined period of time (usually the declared Plan Year).
- Mid-year fluctuations in enrollment. Generally in self funding, if enrollment varies during a coverage period by +/- 10% or more, the excess loss coverage reserves the right to re-assess and re-rate the excess loss coverage of the underlying group.
- Renewal Underwriting. In both self funding and fully insured contexts, the enrollment and actual experience of the group will be re-rated. Inherently, if there are new group(s) added to the AHP, the new groups' enrollment/health experience will be factored into the resulting premium quote (fully insured) or excess loss coverage (self-funding). The point being, the actual risk of the group will be accounted for on renewal.

For these reasons, the NPRM proposal is impractical. Specifically, the proposal means whatever the premium (fully insured) or attachment factors (self funded) set for the plan year, they cannot be altered for the addition of any new group not coinciding with the overall renewal underwriting process. The proposal would force AHPs to accept (and subsidize) any and all new applicants to the Plan with no ability to underwrite the actual group. This amounts to Guaranteed Issue.

With no ability to partially or fully underwrite an applicant employer means that a group with substantial claims (and rates as a result) could force themselves upon any AHP. This amounts to adverse selection.

Thus, in the spirit of maintaining full access to coverage markets, this provision of the NPRM will de-stabilize AHPs, which are not carriers and are likely to be small to medium sized entities (even in their aggregate number of members) who will be unable to fiscally absorb the impact of a new AHP employer entrant with significantly higher claims expense. It undermines the underwriting of the existing core of the AHP. Underwriting (fully insured and self funded) would then have to set their annual rates to account for whatever unknown undisclosed mid year entrants with unknown risk factors that may enter the program, resulting in a risk adverse rate that may make the AHP fiscally unsustainable (which may partially explain the marginal performance to date despite the current ability of the fully insured market to cover MEWAs).

If mid-Plan-Year entrance to AHPs is disallowed (thereby addressing the mid-year underwriting issue), it limits the nimbleness of the AHP to provide meaningful coverage alternatives, thwarting an objective of the NPRM. It will also cause the renewal period to become volatile in the consideration of an influx of membership, causing rates to potentially swing wildly, throwing the existing AHP members to consider maintaining/abandoning the AHP. Again, de-stabilizing.

Respectfully suggested, if incoming employer applicants to an AHP cannot be underwritten, IDA requests the Department permit the AHP to assess a partial rate benchmarked to the core AHP's established rate. Set a ceiling that cannot be exceeded, tailored to the then-existing size of the AHP. Provided merely to illustrate the example, AHPs with existing membership of 1000+ covered individuals cannot assess a rate beyond 130% of the AHP's existing rate for incoming applicants whereas an AHP with no more than 350 covered individuals cannot assess a rate more than 150% of the existing AHP rate. This blunts the issue of adverse selection and guaranteed issue, enables access to the AHP coverage option for applicants, and buffers the expense upon the existing AHP, bolstering AHP operational viability.² To prevent abuses, the suggested rate differential could be tiered down to 0% over a period of years of continuous enrollment in the AHP (limited to no more than three years). This would provide time for the rates to stabilize and be absorbed by the AHP while the differently rated employer also acclimates into the core of the AHP.

Application of State Regulation/Request for Clarification – 83 Fed.Reg 825

IDA notes with interest the discussion at 83 Fed.Reg. 625, Column 1 and 2 that in context, discusses multi-state self-funded AHPs. Specifically, the NPRM seems to indicate that MEWAs, even those covered by an exemption, would still be subject to state regulation. To this point, IDA seeks clarification.

Specifically, proposed 29 CFR 2510.3-5(b) re-interprets the definition of an "employer" to be inclusive of what the NPRM otherwise calls an "Association Health Plan (AHP)". It seems to follow that if an AHP is deemed to be a valid "association" and therefore an "employer" under ERISA 3(5), it no longer fits within the definition of a "Multiple Employer Welfare Fund (MEWA)" as defined at ERISA 3(40) despite being comprised of multiple employers. If accurate, all rights, responsibilities and protections of being an ERISA 3(5) "employer" rather than an ERISA 3(40) "MEWA" apply – wherein consideration of state regulation of a self funded AHP would be largely inapplicable. If however, the NPRM was discussing a MEWA that failed to meet the proposed criteria for a bona fide AHP (thereby falling into the definition of a MEWA rather than as an AHP/Association/Employer), IDA fully agrees with the commentary.

Due to the significance of the issue, IDA seeks the Department's consideration and fuller declaration on this topic – noting industry disagreement on the point.

² This parallels the ability of plans to protect fiscal operations by charging upto 150% of the standard COBRA rate for disability beneficiaries (the point being that other aspects of plan operations permit actual risk and experience to be addressed).

Conclusion

In support of the Department's proposal, IDA submits these comments. We share the aim of enabling Association Health Plans, but only in such a manner to avoid the failures (and lessons learned) from the past.

IDA thanks the Department for the opportunity to submit these comments. IDA makes itself available to the Department for any further discussion or comment the Department may find useful or helpful. If such need arises, please do not hesitate to contact me at 201.337.0007, extension 260 or at droslokken@idatpa.com.

Respectfully Submitted



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