



March 6, 2018

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

RE: Association Health Plans Proposed Rule (RIN 1210-AB85)

Dear Secretary Acosta:

The Epilepsy Foundation is pleased to submit comments on the Department of Labor's proposed rule issued on January 5, 2018 that expands the scope of applicability of Association Health Plans (AHPs). The Epilepsy Foundation is the leading national voluntary health organization that speaks on behalf of the at least 3.4 million Americans with epilepsy and seizures. We foster the wellbeing of children and adults affected by seizures through research programs, educational activities, advocacy, and direct services. Epilepsy is a medical condition that produces seizures affecting a variety of mental and physical functions. Approximately 1 in 26 Americans will develop epilepsy at some point in their lifetime. For the majority of people living with epilepsy, epilepsy medications are the most common and cost-effective treatment for controlling and/or reducing seizures, and they must have meaningful and timely access to physician-directed care. Epilepsy medications are not interchangeable and treatment of epilepsy is highly individualized. There is no "one size fits all" treatment option for epilepsy, and the response to medications can be different for each person. Maintaining seizures control with minimal side effects requires careful evaluation and monitoring by physicians and their patients. To change, limit, or deny access to medications could be extremely dangerous.

The Epilepsy Foundation believes the proposed changes would negatively impact access to quality, affordable care for consumers, disrupt the individual and small business marketplace, and further strain the limited resources of state regulators. The loosely affiliated small businesses joined together as AHPs would be exempt from many of the consumer protections created by the Affordable Care Act (ACA), including insurance standards such as Essential Health Benefits, premium rating rules, and risk pooling. In addition, as we have seen in the past with AHPs, fraud, abuse, and plan solvency present potential concerns, especially as AHP oversight and regulatory authority remains in question.

Access to Quality, Affordable Care for Consumers

The proposed AHPs would not have to comply with the ACA marketplace requirement of covering the ten categories of defined Essential Health Benefits. Some employers may offer AHPs to their employees with an overall benefit package that does not provide adequate coverage. Employees may not even realize they have substandard coverage until their healthcare needs change and the therapies, services, and providers they need are not covered. As a result, individuals with complex chronic conditions like epilepsy and who need comprehensive coverage would be unable to obtain the coverage needed. Individuals must have access to the full array of Essential Health benefits for health insurance to be meaningful and so they can be assured that what they need, or might need in the future, will be covered.

The proposed rule would allow for plans to not cover certain prescription medications, such as those that treat epilepsy and other conditions such as HIV, hepatitis, or cancer. Health status is dynamic and individuals cannot often predict what services they might need in the future. If an individual were to become ill and the services they need are not



covered by their AHP, they may have to choose between seeking or forfeiting care due to the unaffordable costs of uncovered services. This can lead to beneficiaries entering financial peril due to unexpected medical costs and high healthcare bills. As a result of the ACA and increased access to comprehensive healthcare, there has been a 50 percent decline in personal bankruptcies filed between 2010 and 2016.¹ We are that if the proposed rule were to be finalized, this positive trend would be reversed.

The Epilepsy Foundation appreciates the Department's request for information about required notices. AHPs should be required to provide notice to employer groups and potential beneficiaries if plans do not meet standards for minimum value. This would ensure that employer groups and employees know that the plans are less comprehensive than health plans available on the individual or small group markets. Further, if the AHP does not meet minimum value, the employees and their dependents must be made aware of their right to receive coverage through the ACA marketplaces, potentially with premium tax credits based on their income. Similarly, AHPs should be required to notify employer groups and potential beneficiaries of any Essential Health Benefits not covered by their plans.

Protecting Consumers from Harmful and Discriminatory Practices

Many individuals with epilepsy have first-hand experience with the harmful practices employed by health insurance companies such as annual or lifetime limits and medical underwriting prior to the implementation of the ACA. In the past, insurers evaluated health status, health history, and other risk factors of applicants to determine whether and under what terms to issue coverage. The proposed rule states that AHPs would offer small businesses the same relief large-employer plans have enjoyed from strict ACA and State rules. While AHPs would not be allowed to turn away individuals seeking to purchase the plan, they could use different membership criteria or plan benefit design based on other classifications. Consumers enrolled in AHPs must be guaranteed protections against plans that may engage in discriminatory practices or decline coverage for beneficiaries with pre-existing conditions. Even if plans are prohibited from declining coverage to people with a pre-existing condition, insurers could preclude coverage of certain services, providers, or classes of medications if they are not required to cover all Essential Health Benefits. This would have the same effect as failing to cover individuals with pre-existing conditions. Further, an AHP could use the enrollees' health status, gender, or work industry to determine rates.

The proposed rule further skirts consumer protections while perpetuating the trend of healthcare costs outpacing income increases for the average family. These AHPs would be exempt from protections such as cost-sharing limits, rating rules, and caps for consumers' out-of-pocket spending on deductibles, copays, and coinsurance. The consumer protections created by the ACA are critically important for making quality health care affordable. Without these protections, insurers would likely resort to the practices of the past which made healthcare unattainable to so many individuals, particularly people with serious and complex chronic conditions such as epilepsy.

Impact on the Individual and Small Business Marketplace

The Epilepsy Foundation strongly urges the Department of Labor to consider the implications of the expanded definition with regards to the Employee Retirement Income Security Act (ERISA). The intent of the President's executive order was to increase consumer choice while curbing costs. However, we believe that AHPs, as proposed, would invariably weaken the individual and small group markets leading to higher healthcare costs for all including higher premiums for those who stay in the marketplace and higher out-of-pocket costs for those who would rely on AHPs for unexpected medical needs.

¹ <https://www.consumerreports.org/personal-bankruptcy/how-the-aca-drove-down-personal-bankruptcy/>



Individuals with serious and chronic conditions would be more likely to enroll in coverage offered in the exchange. Conversely, younger and healthier individuals may be more likely to prioritize cost of premiums over generous benefit coverage when shopping for insurance. Thus, the younger and healthier population may be more drawn to AHPs, despite the fact that these products will likely have less comprehensive coverage. Over time, as younger and healthier individuals leave the marketplace, premiums would likely increase and fewer issuers may participate in the state's marketplace.

Limited Resources of State Regulators

It is the responsibility of federal and state regulators to ensure that there is sufficient oversight of insurance plans and that consumer protections are being enforced. Due to the language of the proposed rule, it is unclear who would be overseeing these important functions under AHPs. While the Department states that the proposed rules do not alter existing ERISA statutory provisions governing multiple employer welfare arrangements (MEWAs), we are concerned that the proposed rules would have the result of preempting existing and future efforts by states to regulate them. This diminishes state authority to hold these insurers to specific rating, contractual, and marketing standards. This also places an undue burden on consumers to seek assistance from a federal entity if they were to encounter issues with their AHP. States must maintain the ability to protect patients and manage their health insurance markets and enforce the consumer protections.

If plans are able to operate in multiple states, it is unclear how state law would be enforced, and which state's law would take precedence. This is why insurance commissioners have long opposed the idea of selling insurance products irrespective of borders, or across state lines. In the past, AHPs became a way to sell fraudulent plans, capitalizing on confusion between state and federal regulations. As a result of the ambiguous enforcement authority, plans sold across state lines may be more susceptible to fraud and harder to protect consumers.

While the proposed rule indicates states would be able to impose requirements such as reserve standards and other financial requirements upon AHPs, there is no indication that states are adequately resourced to enforce these requirements. In addition, some states may be hesitant to go after these plans given that questions remain about the extent to which States have authority to regulate the plans. Unfortunately, we have seen numerous examples in the past of AHPs becoming insolvent either because the AHP was formed with fraudulent intent or because the AHP failed to be adequately capitalized. In such instances, consumers—many of whom had serious and chronic diseases—experienced great harm when they were left with significant medical bills after their AHP folded and was unable to pay their claims. While the proposed rule seeks to remedy this problem, it remains unclear whether states have the resources or willingness to enforce these protections that consumers rely on.

Please do not hesitate to contact Angela Ostrom, Chief Legal Officer & Vice President Public Policy, at 301-918-3766 or aostrom@efa.org with any questions or concerns. Thank you.

Sincerely,

A handwritten signature in black ink that reads "Phil M Gattone".

Philip M. Gattone, M.Ed.
President & CEO
Epilepsy Foundation