



AMERICAN OSTEOPATHIC ASSOCIATION

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March 6, 2018

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

Dear Secretary Acosta,

On behalf of the American Osteopathic Association (AOA) and the nearly 140,000 osteopathic physicians and osteopathic medical students we represent, thank you for the opportunity to respond to the Department of Labor's proposed rule defining the term "employer" under Section 3(5) of ERISA. We appreciate the Department's effort to make health insurance more affordable and accessible for consumers, and there are aspects of the proposed rule that have potential benefits to AOA members. However, we are also concerned that if this rule is finalized, it has the potential to change the compositions of the individual and small group health insurance market places, risking stability and insurance affordability for many individuals and families.

We appreciate the Department's effort to make health care more affordable for employees of small businesses, small business owners, and sole proprietors in a manner that seeks to protect them from discrimination based on health status. Health care stakeholders across the United States share the responsibility of promoting reforms and policies that ensure individuals and families will have access to coverage and care when and where they need it. Among the core principles of osteopathic medicine are providing coordinated care across the health care spectrum.

The AOA believes that the goal of any health care policy should be to maximize coverage and increase access to health care services through sound policy that protects consumers and pre-empts potential abuses. We have concerns with the proposed rule regarding the vagueness of commonality of interest requirements for forming Association Health Plans (AHPs) and the impact of the rule on risk pools and cost-sharing subsidies.

*Sole Proprietors and Physicians in Small Practices*

A significant portion of osteopathic physicians are employees of small practices, and many members of our profession own their own practices and are sole proprietors. We appreciate the inclusion of the sole proprietor provisions that would allow physicians who practice independently to more easily obtain coverage. We also support the opportunity for physicians in small practices to join together to obtain coverage under the large group market.

In the current landscape, many osteopathic physicians who seek health coverage struggle with soaring premiums as owners of small businesses and sole proprietors. Physicians who are members of small practices are forced to purchase plans sold in the small group marketplace, and independent practitioners with their own practice must purchase costly individual marketplace coverage. Further, physicians purchasing in the individual marketplace often don't qualify to benefit from cost-sharing reductions.

The ability to obtain a health plan by joining with other physicians under a single association will likely allow them to obtain more affordable coverage that meets their needs. Additionally, the ability to seek this coverage with their peers would allow for plans to be offered that cater specifically to members of this profession and account for the risk associated with this population. The AOA welcomes this provision but believes it should be modified to limit membership in an AHP to a specific industry or profession.

### *Commonality of Interest Requirement*

We appreciate the Department of Labor's effort to make health insurance more affordable for those who own or are employed by small businesses. However, in defining the requirements for a "bona fide group or association of employers" that act as an employer in relation to an employee benefit plan, the rule relaxes requirements, making them exceedingly broad. This is especially concerning in regard to the commonality of interest requirement established in paragraph (b)(5) and defined in paragraph (c). Traditionally, a "bona fide group or association of employers" has been defined as "employers having a common interest, usually by being members of the same industry, and joining together for purposes other than providing benefits." However, the rule redefines the commonality of interest so that groups and associations must only meet one of the following requirements: "being in the same trade, industry, line of business or profession" or "having a principal place of business in a region that does not exceed the boundaries of a state or metropolitan area." Historically, the "commonality of interest" standard exists to ensure that associations or groups are formed in the interest of their members and that the commonality serves to ensure that the organization is able to operate like a single employer when establishing benefit plans. The relaxed requirement in the proposed rule would permit large associations of employers with no connection to each other, aside from geographic location, to form for the explicit purpose of establishing health plans under large group market rules.

Because the associations operate in the large group market, they are exempt from many consumer protections that are in place under the ACA. Additionally, the lack of a true "commonality of interest" creates circumstances that are ripe for abuse, opening doors to fraudulent AHP behavior. This counteracts the Department's goal of ensuring that associations act in the interest of their members, which it reaffirms in the discussion preceding the rule, stating that it is requiring associations to be controlled by members "to satisfy the statutory requirement in ERISA section 3(5) 25 that the group or association must act 'in the interest of' the direct employers in relation to the employee benefit plan, and to prevent formation of commercial enterprises that claim to be AHPs but, in reality, merely operate similar to traditional insurers selling insurance in the group market."

We urge the Department of Labor to reconsider the new standard for "commonality of interest" to ensure that small business owners and sole proprietors, who are seeking relief from high premiums, are not left with unpaid claims from AHPs that do not act in the interest of a particular industry or profession, that are mismanaged, and that then become insolvent.

### *AHP Solvency and Potentials for Abuse*

AHPs have a long history of fraud and abuse that have left beneficiaries with unpaid claims. Historically, AHPs, a form of Multiple Employer Welfare Arrangement, have used actuarially unsound premium structures due to high administrative fees and unusually low premiums. Often, these organizations would pay administrative fees before paying claims. This led to insolvency across many AHPs and inability to pay medical expenses covered under beneficiaries' plans, leaving members with large unpaid bills.

In an effort to curb these abuses, numerous legislative changes have been implemented since the 1980s, including subjecting MEWAs to state insurance regulation through the Multiple Employer Welfare Arrangement Act of 1983, strengthening of regulatory and enforcement capabilities of the Department of Labor under ERISA, and through anti-fraud enforcement and reporting provisions in the PPACA. This has had the effect of curbing abuse and protecting consumers from fraudulent organizations. However, the AOA is concerned that this proposed rule to change the definition of "employer" under ERISA would reopen the door for the formation of abusive AHPs by allowing associations to form for the explicit purpose of offering plans exempt from PPACA consumer protections to businesses within a particular region, without having any accountability to members of a particular industry or profession. A more effective model for AHP formation would be to limit commonality of interest to members of a particular industry or profession, and to strengthen oversight of these plans.

As a physician organization, we are committed to ensuring that our patients and physicians can affordably access the care they need. We are concerned that this rule blurs jurisdictional boundaries for oversight of AHPs by creating an overly complex regulatory environment that could permit abuse. We strongly urge the Department of Labor to reconsider this rule due to the potential for exploitation. If the Department chooses to move forward with this rule, we urge it to revise the "commonality of interest" standard.

### *Risk Pools and Impacts on Consumers*

As a physician organization, one of our foremost concerns is that patients are able to afford and access the care that they need. If association health plans are permitted to form, they should serve the goal of expanding coverage to quality care. The proposed rule is likely to further destabilize the individual and small group health insurance markets. Because the association health plans will be formed under the large-group market place, they will be exempt from many consumer protections such as essential benefits, and associations will be free to create plans that may, although unintentionally, discourage certain populations from enrolling. Furthermore, as the rule is written, plans would not need to be developed in ways that serve the needs of members of a particular profession or industry. A likely consequence of this is that many small businesses may choose to join groups or associations that have formed in their geographic region that offer health plans with limited benefits, leaving some employees without adequate coverage.

Families are also likely to lose cost-sharing subsidies if an individual works for a small employer that chooses to join an AHP. If an individual has access to insurance through their employer, they are no longer eligible for cost-sharing subsidies that allow them to purchase the plans that best meet their needs. Many families rely on cost-sharing subsidies to ensure that they can access care or treatments, and loss of

these subsidies would force many employees of small business to go without needed coverage, and ultimately care.

The AOA appreciates the Department of Labor's effort to expand access to health care coverage by making it more affordable. However, we believe that the overall consequences of the proposed rule will be contrary to its intent. These consequences will include health insurance market instability, loss of cost-sharing subsidies for families, less freedom for employees of small businesses to choose plans that fit their needs, and mismanagement by AHP's that result in unpaid claims. We appreciate the opportunity to be a part of the effort to strengthen access to health insurance and would be pleased to provide additional insight as you complete rulemaking. To do so, or for additional information, please contact David Pugach, Senior Vice President for Public Policy, at [dpugach@osteopathic.org](mailto:dpugach@osteopathic.org), or (202)-349-8753.

Sincerely,



Mark A. Baker, DO  
President