



OFFICE OF
INSURANCE COMMISSIONER

March 6, 2018

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

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

To Whom It May Concern:

Thank you for the opportunity to comment on the proposed regulation, "Definition of 'Employer' Under Section 3(5) of ERISA—Association Health Plans" (83 Fed. Reg. 614 (Jan. 5, 2018)) (AHP Proposed Rule). I write as the chief insurance regulator of Washington state.

Let me first say that the Washington State Office of Insurance Commissioner (OIC) fully endorses the comments submitted by the National Association of Insurance Commissioners. In particular, we agree that state authority to regulate self-funded and fully-insured multiple employer welfare arrangements (MEWAs), as reflected in the Erlenborn-Burton Amendment, must be retained.

States have the experience and capacity to carry out market oversight and enforcement – critical components of our regulatory authority. The U.S. Department of Labor, while well-intentioned in its enforcement efforts, severely lacks the resources necessary to effectively oversee MEWA activities throughout the states. This lack of federal oversight will only be compounded by expanding the number of associations eligible to sell association health plans (AHPs).

Washington state has unique legislation and case law regarding AHPs. In 2004, the Washington State Legislature made an explicit policy decision to limit the operation of MEWAs to the fully-insured market. Under that law, Washington does not issue certificates of authority for new self-funded MEWAs. (See Chapter 48.125 RCW) Currently, only two self-funded MEWAs remain active in the state.

In contrast, we have a large and vigorous fully-insured AHP market. The majority of small employers in Washington are now insured through an AHP. In 2011, my office commissioned Mathematica Policy Research to evaluate the role of AHPs in our small-group health insurance market.¹ Mathematica's report found that average premiums for AHP small employers in 2010 (\$278) were substantially lower than those for small employers in our community-rated small group market (\$382). However, this inexpensive alternative for small employers appeared to come at a cost to the community-rated small

¹ Chollet, D., Mathematica Policy Research, "Association Health Plans and Community-Rated Small Group Health Insurance in Washington State – Final Report", at p. 20 (September 30, 2011), http://www.statecoverage.org/files/Mathematica_assoc_healthplans_WA.pdf

group market, which skewed toward markedly older and sicker enrollees, and had more female enrollees. We concluded, therefore, that AHPs were able to identify and enroll those small employers with lower health risk, thus making the community-rated small group market more costly, less attractive to issuers, and less stable.

As has been pointed out, we have exercised our authority to regulate the AHP market indirectly through our regulation of issuers. Those offering AHPs in Washington state must file their health plans with the OIC for review.² Beginning in 2014, they were required to state in their filing verification that the purchasing association meets the federal criteria as a “bona fide” association, as demonstrated by either a letter of opinion from the U.S. Department of Labor (DOL) or an attorney certification. We are guided by DOL opinions and federal case law in determining whether an AHP is “bona fide.”

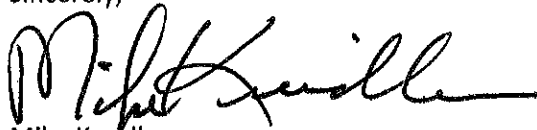
AHPs in our state now occupy a unique status that impacts rate review standards. In 1995, our Legislature exempted AHPs from small-group community rating requirements. Employers that purchase health plans through an association are “not small employers,” regardless of the size of the employer.³

Therefore, AHPs, like large-employer plans, are exempt from many requirements of the federal Affordable Care Act and are permitted to negotiate rates with issuers. But, because they are not specifically defined as large employers in state law, they are permitted to rate at the employer-member level within the association.⁴ Consequently, they are not specifically subjected to the non-discrimination provisions in federal law for large groups, which strictly govern the permissible rating variations within a single large group. As a result, Washington’s AHPs are a unique hybrid between small and large group.

My reading of the proposed regulation, which defines AHPs as “large group,” is that the current status of AHPs under Washington state law would be preempted under this regulation, and AHPs would be subjected to the large-group nondiscrimination rating requirements and other applicable group health plan requirements under The Employee Retirement Income Security Act of 1974 (ERISA).

Thank you for the opportunity to comment on the proposed regulation. I look forward to continued collaboration as it is developed.

Sincerely,



Mike Kreidler
Insurance Commissioner

² RCW 48.43.733

³ RCW 48.21.047(2)

⁴ See Order on Cross-Motions for Summary Judgment entered by Presiding Officer Finkle in the Matter of MBA Trust (OIC Dkt. No. 15-0062), BIAW Trust (OIC Dkt. No. 15-0075), NMTA Trust (OIC Dkt. No. 15-0079) and Cambia (OIC Dkt. Nos. 15-0071, 15-0078, and 15-0084) (July 1, 2015).