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September 18, 2018

Ms. Jennifer Cook
Senior Health & Life Policy Counsel
National Association of Insurance Commissioners
701 Hall of the States
444 North Capitol Street, N.W.
Washington, D.C. 20001-1509

Re: ERISA (B) Working Group Draft Revisions to the NAIC ERISA Handbook

Dear Ms. Cook:

Groom Law Group is providing comments on the NAIC ERISA (B) Working Group's latest draft revisions to the NAIC ERISA Handbook ("Handbook"), draft dated July 20, 2018. Our comments are directed toward clarifying the Handbook's discussion of association health coverage, including the discussion of the recently finalized Department of Labor ("DOL") rule amending the definition of "employer" under Section 3(5) of ERISA-Association Health Plans and the Handbook section titled "Association Coverage: Is it Individual, Small Group or Large Group Coverage?" We appreciate the challenges inherent in describing the federal rules and guidance related to association health plans and appreciate NAIC's continued effort to draft a comprehensive, usable Handbook.

We have several suggestions that we believe will help clarify the descriptions of both the prior federal guidance and new federal rules for Association Health Plans (AHPs).

1. Clarify that new plans can form and elect to follow either the prior DOL AHP guidance or the new AHP rules.
2. Revise the MEWA and Association Health Plan sections to clarify not only that it was possible to form a Plan MEWA¹ under the prior guidance, but that the DOL has issued new rules that provide an alternative method of achieving Plan MEWA status.
3. Briefly describe the two "tracks"—the requirements to be considered an AHP under the previous guidance and the contours of the new AHP rule. This description should summarize the key differences between AHPs that are subject to the old guidance and

¹ We use the term "Plan MEWA" to mean a MEWA operating as a single group health plan. For example, an association that operates as a Plan MEWA is one that sponsors a single group health plan at the association level. In contrast, a "non-Plan MEWA" is a MEWA that encompasses multiple plans, each sponsored separately by a participating employer.

AHPs that are subject to the new rule, such as the application of specific nondiscrimination requirements to AHPs formed under the rule.

4. Specifically address the flexibility permitted under federal law, including the ability to age and gender rate on an employer-by-employer basis for AHPs formed under the new rule and to rate based on health claims experience on an employer-by-employer basis for AHPs formed under the prior DOL guidance.

Our more detailed comments follow.

1. Clarify new plans may follow the previous guidance.

To begin, we recommend that NAIC clearly state that new plans can form and elect to follow the *previous DOL AHP guidance*, in addition to the new AHP rules. Although we believe that this is clear in parts of the Handbook,² we believe that it is critical to clarify this point throughout the Handbook given the important differences in treatment (*e.g.*, nondiscrimination requirements) between AHPs that meet the prior guidance and AHPs that form under the rule. We suggest that clarifications be provided in both the MEWA (beginning at p. 48) and Association Coverage (beginning at p. 82) sections of the Handbook.

2. Clarify there are two alternative avenues to Plan MEWA status.

While the Handbook clearly recognizes the pre-2018 guidance, we suggest that it could more clearly express that under federal law, there are currently two “tracks” to qualify as a plan at the association level. For example, on page 51, the Handbook says:

DOL has issued a safe harbor rule establishing criteria that qualify a MEWA to be recognized as an employee benefit plan, and has also issued guidance for determining whether or not a MEWA qualifies if it does not meet the safe harbor requirements.

What the Handbook describes as a “safe harbor,” the DOL itself describes as “prior interpretations” and/or “and new “alternative criteria” and/or an “alternative mechanism.” The DOL has also re-affirmed that old and new plans can choose to follow either the “prior” guidance or the “new” rules. *See, e.g.*, Definition of “Employer” Under Section 3(5) of ERISA-Association Health Plans, 83 Fed. Reg. 28912, 28955 (June 21, 2018) (stating that the DOL intended to allow “new AHPs to operate pursuant to either this new rule or the Department’s pre-

² See, for example, p. 42 (“DOL has stated that the Rule is not the exclusive pathway for recognition as a “bona fide” group or association, and arrangements that qualify as employee benefit plans under prior DOL guidance will continue to be recognized as employee benefit plans.”).

rule guidance ...”). To be clear, it is not the characterization as a “safe harbor” that is particularly concerning. However, the MEWA section of the Handbook seems to minimize DOL’s prior interpretations and may leave the impression that the prior guidance is no longer operative (*i.e.*, that there is only one track to being an AHP).

In the “Association Coverage: Is it Individual, Small Group or Large Group Coverage” section, the first several pages are written without reference to the new rule, which may lead a reader unfamiliar with topic to believe that these pages apply to **all** association coverage and that prior to the new rule, Plan MEWAs did not exist. For example, one paragraph suggests that “look-through” treatment always applies to Plan MEWAs:

Under federal law, group policies issued to associations, or to any other group comprising more than one employer or more than one household, are regulated on a “look-through” basis; *i.e.*, the individual, small group and large group markets are defined by the nature of the customer that buys the coverage, not by the form of the contract. In particular, the Public Health Service (PHS) Act defines the “small group market” as “the health insurance market under which individuals obtain health insurance coverage (directly or through any arrangement) on behalf of themselves (and their dependents) through a group health plan maintained by a small employer.” In exactly the same manner, all health insurance provided through a large employer’s group health plan, “directly or through any arrangement,” is defined to constitute the large group market.

Handbook, p. 83. Of course, the prior federal guidance requires look-through treatment, but only in certain circumstances. Specifically, if the MEWA is not a single group health plan at the MEWA level, then insurance coverage is sold on a “look-through” basis. But for association MEWAs that are group health plans at the MEWA level (either because of the AHP rule or because it meets the pre-AHP rule standards), the size of the overall group determines the market for coverage (*i.e.*, small or large)—there is no “look-through.”

Similarly, the Handbook later states:

The CMS Bulletin describes “health insurance coverage offered to collections of individuals or employers through entities that may be called associations, trusts, multiple employer welfare arrangements (MEWAs), or purchasing alliances.” *However, as discussed above, regardless of how it is structured, all such coverage is classified as either individual coverage, small group coverage or large group coverage, depending on whether it is sold to individuals and families, sold to small employers providing group health plans, or sold to large employers providing group health plans.*

Handbook, p. 84. The italicized sentence applies to non-Plan MEWAs.³ However, it does not apply to Plan MEWAs, including those Plan MEWAs that existed before the new AHP rule. This description leaves the impression that prior to the AHP rule, there were no Plan MEWAs and therefore, that the AHP rule must be the only available track to Plan MEWA status.

3. Outline the key criteria for Plan MEWA status for both tracks, highlighting critical differences.

In addition to generally clarifying in its descriptions that two avenues are available for Plan MEWA status, we suggest that the Handbook clearly outline and contrast the tracks that a plan may travel to become an AHP. For example, a short chart comparing prior guidance for Plan MEWA status to the AHP rule with respect to membership, control, geography, application of nondiscrimination requirements, rating rules (such as employer-level rating, as well as rating factors like geography, sex, age and industry) and other important criteria would be helpful in both clarifying the difference between the two tracks, but also in highlighting what could be significant differences between Plan MEWAs under the prior guidance and Plan MEWAs under the new rule.

4. Expand the Handbook's discussion of, and reference to, rating for AHPs.

With respect to some of the differences between the two tracks that might be significant, we recommend that the Handbook specifically address employer-by-employer rating under AHPs and any areas where there are differences between AHPs that qualify as single group health plans for purposes of ERISA under the prior DOL guidance and AHPs that qualify under the new AHP rule. For example, the AHP rule is clear that gender and age rating on an employer-by-employer basis is not prohibited, although states may have different applicable rules. We note that the latest draft of the Handbook clearly recognizes that for AHPs that qualify under the old guidance, employer-by-employer rating is (and has been) permitted –

In the 2018 AHP Rule, DOL established nondiscrimination requirements that prohibit experience rating at the member employer level for AHPs formed under the Rule. However, DOL indicated that it did not interpret the prohibition on experience rating as being required in all cases by the underlying statute, and that DOL would permit AHPs qualifying under the pre-2018 regulatory guidance to experience-rate at the member level, as long as it was not a pretext for discriminating against a particular employer or plan participant, because the pre-2018 guidance “had a stronger employer nexus requirement.”

³ A “non-Plan MEWA” is a MEWA that includes multiple plans, each sponsored separately by a participating employer. In contrast, a “Plan MEWA” is considered a single group health plan under ERISA.

Ms. Jennifer Cook
September 18, 2018
Page 5

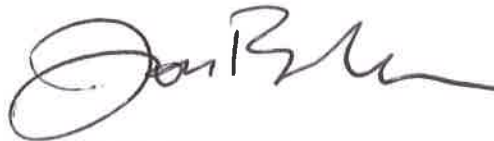
Handbook, p.92. Because this is a critical issue with respect to AHPs, we would suggest that the NAIC also include this information on page 41, when introducing AHPs that qualify under the prior guidance. For example, (suggested text underlined):

In particular, DOL has taken the position that the nondiscrimination provisions in the AHP Rule are not necessary for associations that comply with the pre-2018 DOL guidance, because the “pre-rule sub-regulatory guidance had a stronger employer nexus requirement.” DOL has also taken the position that experience rating at the member employer level is also permitted for AHPs, regardless of the date the AHP was formed, provided that the AHP complies with pre-2018 DOL guidance and as long as the experience rating is not pretext for discriminating against a particular employer or plan participant.

Handbook, p.41.

We appreciate the opportunity to provide comments and would be happy to discuss these comments at your convenience.

Sincerely,

A handwritten signature in black ink, appearing to read "Jon Breyfogle". The signature is fluid and cursive, with a large initial "J" and "B".

Jon W. Breyfogle