

September 28, 2018

To: Bob Wake, Chair, ERISA Working Group
Jennifer Cook, Senior Health and Life Policy Counsel
National Association of Insurance Commissioners
From: NAIC Consumer Representatives
Date: September 28, 2018

On behalf of the NAIC consumer representatives signed below, we appreciate the opportunity to comment on the draft of the ERISA Handbook dated July 20, 2018 and exposed for comment at the NAIC's summer national meeting.

We understand the Handbook will be updated to reflect publication of the final federal rule on Association Health Plans, titled, "Definition of 'Employer' Under Section 3(5) of ERISA – Association Health Plans." In doing so, we recommend the sections entitled *Multiple Employer Welfare Arrangements* (beginning on page 48) and *Association Coverage: Is it Individual, Small Group or Large Group Coverage?* (beginning on page 82) be revised to address the following:

- The final rule provides an additional way for an association of employers to be determined to be an "employer" under ERISA. New AHPs can therefore form and offer coverage under either the prior guidance or under the new rule.
- AHPs formed and operated under the new regulatory pathway are prohibited from discriminating in eligibility, benefits or premiums based on a health factor either within or across employer groups that obtain coverage through the AHP.
- The final rule reaffirms the authority of states to regulate both fully insured or self-insured MEWAs.

The Handbook notes the extensive history of AHP fraud and insolvencies that left consumers and providers with unpaid claims. We are concerned that the more flexible, newly authorized path, which makes it easier to meet the test for "employer," will invite greater fraud and insolvencies. Further, while the new rule prohibits basing eligibility, benefits or premiums on health status, we remain concerned that AHPs operating under the final federal rule retain the flexibility to rate on other factors that can be used as a proxy for health status, such as age, gender and industry and can design benefits to avoid higher cost employers and individuals.

Despite comments from the NAIC and many state regulators asking for federal regulators to delay implementation of the final rule until 2020, some types of AHPs have been able to form and operate under the new, more flexible guidance since September 1st. We therefore urge the Working Group to finalize the Handbook to incorporate the final federal rule as quickly as possible. We believe that doing so will provide much-needed guidance to state regulators seeking to protect consumers.

Thank you for your consideration. If you have any questions, please contact JoAnn Volk at 202-687-3944 or joann.volk@georgetown.edu.

Anna Howard
Karrol Kitt
Lucy Culp
Claire McAndrew
Harper Jean Tobin
Robert James
Carl Schmid

Matthew Smith
Debra Judy
Marguerite Herman
JoAnn Volk
Peter Kochenburger
Amy Killelea
Lincoln Nehring

Katie Keith
Silvia Yee
Ashley Blackburn
Deborah Darcy
Andrew Sperling
Brendan Riley