Mr. Alexander Acosta
Secretary of Labor
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

Re: "Definition of Employer under Section 3(5) of ERISA-Association Health Plans"; RIN 1210-AB85

Dear Secretary Acosta,

I am writing to express my concern and request a clarification regarding the Department of Labor's (DOL) proposed rules that would broaden the definition of an "employer" under section 3(5) of the Employee Retirement Income Security Act (ERISA) for purposes of sponsoring a group health plan in order to expand access to association health plans (AHPs).[1] If the DOL chooses to finalize the proposed rules, concurrent guidance is necessary to explain their interaction with the small employer exemption from the Mental Health Parity and Addiction Equity Act (MHPAEA).

During public hearings held by the President's opioid commission and elsewhere, you and the DOL have repeatedly stressed the importance of the protections provided by MHPAEA, which ensures that financial requirements and treatment limitations for mental health and substance use disorder benefits are no more restrictive than those placed on medical and surgical benefits. In light of the ongoing opioid epidemic, preserving access to these benefits is more important than ever. However, the rules as proposed appear to allow most AHPs to qualify for the small employer exemption from MHPAEA regardless of the size of the group or association that offers the AHP or the number of participants and beneficiaries covered by the AHP. Because most AHPs will be self-funded or offered in the large group market, they will also not be subject to MHPAEA's requirements via rules regarding essential health benefits (EHB), meaning that these protections could be severely curtailed for millions of Americans who obtain coverage through an AHP rather than a traditional group health plan or individual market policy.

If the DOL moves forward with the proposal, a comprehensive regulatory impact analysis that fully considers the costs and benefits of the rule should account for the lack of MHPAEA protections for AHP participants and beneficiaries and attempt to quantify the effects. I urge the DOL to also add a requirement that an AHP sponsor's prospective and current employer members, as well as their employees that are offered AHP coverage, be provided adequate notice when the AHP plan administrator believes that the AHP is exempt from the requirements of MHPAEA.

Background

With the exception of self-funded group health plans sponsored by small employers, which are rare, nearly every form of major medical coverage is subject to MHPAEA in one of two ways. First, MHPAEA applies directly to every group health plan offered by large employers without

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[1] 83 FR 614 (January 5, 2018).

regard to whether the plan is insured or self-funded.[2] With respect to small employers, MHPAEA provides an exemption for "any group health plan (and group health insurance coverage offered in connection with a group health plan) for any plan year of a small employer".[3] A small employer is defined as "an employer who employed an average of at least 2 (or 1 in the case of an employer residing in a State that permits small groups to include a single individual) but not more than 50 employees on business days during the preceding calendar year".[4] Second, under the Affordable Care Act, health insurance issuers providing coverage in the individual or small group markets must offer ten categories of EHB, including benefits for mental health and substance use disorder services.[5] Regulations issued by the Department of Health and Human Services require that these benefits be provided consistent with the requirements of MHPAEA.[6] Taken together, these provisions ensure that every individual market health insurance policy, insured group health plan sponsored by a small employer, or any group health plan sponsored by a large employer is subject to MHPAEA.

Final Rules Should Clarify When an AHP Qualifies For the Small Employer Exemption from MHPAEA.

In the proposed rules, the DOL correctly acknowledged that "[t]he Department expects minimal interest among large employers in establishing or joining an AHP as envisioned in this proposal because large employers already enjoy many of the large group market advantages that this proposal would afford small employers".[7] Accordingly, nearly all AHPs are likely to provide coverage only to small employers who would qualify for the small employer exemption from MHPAEA but would otherwise be subject to the law through EHB requirements for insured group health plans.

Because MHPAEA provides a definition of a "small employer" that makes no reference to the separate definition of an "employer" under ERISA section 3(5), AHP operators who do not want the burden of complying with the important consumer protections in MHPAEA may reasonably conclude that the definition refers to the common law employers participating in the AHP rather than the group or association acting as the section 3(5) employer that sponsors the AHP. This argument is supported by the fact that the definition of a "small employer" relates to their number of employees, and there is no basis in the DOL's proposed rule or any other Federal law to believe that the AHP participants and beneficiaries should be considered the employees of the group or association offering the AHP if they, in fact, work for the group or association's member employers. Consequently, if an AHP does not have any participating large employers, it may be considered a group health plan "of a small employer" and therefore exempt from MHPAEA.

In any final rule, it is incumbent that the DOL clarify whether it agrees with this interpretation. DOL should also explain whether any distinction is appropriate between self-funded AHPs that are solely subject to MHPAEA through its inclusion in ERISA, and insured AHPs where the

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[2] ERISA section 712(c).
[3] Id.
[4] Id.
[5] Patient Protection and Affordable Care Act section 1302.
[6] 45 CFR 147.150; 45 CFR 156.115.
[7] 83 FR 614, 620.

underlying health insurance policy may be subject to MHPAEA through separate rules that govern group insurance policies offered in the large group market even if the AHP that purchases such a policy qualifies for the small employer exemption.

A Final Regulatory Impact Analysis Should Account for Any Lack of MHPAEA Protections for AHP Participants and Beneficiaries.

The DOL acknowledges in its proposed rules that some AHPs will reduce costs by offering less comprehensive coverage than other group health plans and by enjoying the lighter regulatory framework that applies to large group market coverage and self-funded plans. However, there is no consideration that any AHPs might be able to reduce costs because they could be exempt from MHPAEA, or any other Federal or State requirement that otherwise applies to non-AHP group health plans.

If the DOL finalizes the proposed rules, its regulatory impact analysis should reflect the DOL's interpretation of which AHPs would qualify for the small employer exemption from MHPAEA. If it is the DOL's view that any AHP sponsored by a group or association that consists solely of small employers qualifies for the exemption, then the number of AHP participants and beneficiaries without MHPAEA's consumer protections should be nearly the same as the overall number of individuals enrolled in an AHP. A recent report issued by Avalere Health estimated that an additional 2.4 million to 4.3 million people are likely enroll in an AHP by the year 2022 if the DOL's proposed rules become effective.[8] Similarly, if it is the Departments view that certain AHPs are exempt from MHPAEA but insured AHPs are nevertheless covered through separate rules applicable to the AHP's group insurance policy, the DOL should attempt to estimate the number of affected individuals by separately estimating the number of newly formed AHPs that would be insured and self-funded, and how many people they might cover. For context, a recent report issued by the Kaiser Family Foundation showed that approximately 82% of all group health plans offered by employers with 200 or more employees were self-funded.[9] There is no reason to think that this figure would be significantly different for AHPs.

Final Rules Should Include A Notice Requirement For AHPs That Are Exempt From MHPAEA.

Choosing between health insurance options can be an enormously confusing and overwhelming process. This is true both for individual consumers as well as employers shopping for group coverage to offer their employees. Despite differences in premiums, cost-sharing requirements, and provider networks, many people assume that all coverage options are subject to the same Federal and State laws and offer the same protections, even if this is not always true. This is why it is important that health insurance issuers and group health plans alike provide disclosures to consumers so that they can understand their rights. In recent years, there have been a number of news articles and public statements from high-profile politicians regarding MHPAEA and many consumers are aware of the law. If an AHP plan administrator believes that their AHP is exempt from the requirements of MHPAEA based on their interpretation of the law or guidance

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[8] Avalere Health, Association Health Plans: Projecting the Impact of the Proposed Rule, available at http://go.avalere.com/acton/attachment/12909/f-052f/1/-/-/-/-/Association%20Health%20Plans%20White%20Paper.pdf.
[9] Kaiser Family Foundation, 2016 Employer Health Benefits Survey, available at https://www.kff.org/report-section/ehbs-2016-section-ten-plan-funding/.

provided by DOL in it's final rules, there is no way an AHP sponsor's prospective and current employer members, as well as their employees could be reasonably expected to know that if they enroll in the AHP their access to important mental health and substance use disorder benefits will not be protected. Accordingly, any final rules issued by the DOL should require that AHPs provide adequate notice to all employers and individuals who are offered coverage under any AHP that believes it is exempt from MHPAEA.

Conclusion

The enactment of MHPAEA was a significant advancement in recognizing that benefits for mental health and substance use disorder treatment are every bit as important as benefits for medical and surgical services. The rise of the opioid epidemic and increasing understanding of mental health issues in America make this even more clear. Because MHPAEA provides important protections to consumers seeking treatment for these types of conditions, if the DOL intends to expand the use of AHPs, it is critical that all stakeholders be given the necessary guidance to understand how the law applies to these types of plans.