



March 6, 2018

Submitted via the Federal eRulemaking Portal: <http://www.regulations.gov>

Secretary R. Alexander Acosta
Deputy Assistant Secretary Jeanne Klinefelter Wilson
Attention: Definition of Employer—Small Business Health Plans RIN 1210–AB85
Office of Regulations and Interpretations, Employee Benefits Security Administration
Room N–5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: Definition of “Employer” Under Section 3(5) of ERISA—Association Health Plans; RIN 1210–AB85

Dear Secretary Acosta and Deputy Assistant Secretary Wilson:

Aetna appreciates the opportunity to submit comments on the Definition of “Employer” Under Section 3(5) of ERISA—Association Health Plans (“AHP”) Proposed Rule (“Proposed Rule”), published by the U.S. Department of Labor (“DOL”). 83 Fed. Reg. 614 (Jan. 5, 2018). Aetna is one of the nation’s leading diversified health benefit companies, providing members with resources to enable better informed decisions about their health. Aetna is committed to working with DOL to formulate rules and policies that advance what we believe are consumers’ top priorities in health benefits: affordability, competition, and choice.

Aetna welcomes the Administration’s efforts to encourage more flexible and affordable coverage options for consumers. In particular, we believe that AHPs may be an attractive vehicle for small employers to provide Medicare Advantage (MA) benefits on a group basis to their older workers and retirees. However, as recent experience with the Affordable Care Act (ACA) demonstrates, new coverage options are of limited benefit to consumers if they are not stable and actuarially sound. Therefore in order to create affordable and sustainable new options for working-age consumers through AHPs, we urge DOL to grant the associations offering such plans the flexibility they need to appropriately manage the risk of their programs. We also believe it is important to recognize that self-funded AHPs present a very different set of risks to consumers than do fully-insured AHPs, which come with protection of state insurance regulation.

Therefore, Aetna recommends the following:

- **Clarify that AHPs may offer Medicare Employer Group Waiver Plans (EGWPs) to employment-based groups of retirees.** Explicitly providing for this option would promote flexibility and increase coverage options for older workers and retirees. The DOL should work with CMS to the extent necessary to ensure that EGWPs may be offered through an AHP.

- **Provide rating and enrollment flexibility** by allowing AHPs to implement limited premium variations between participating employers based on experience or health status, and to limit the guaranteed issuance of coverage to an annual open enrollment period.
- **Mitigate the risks of allowing working owners to participate in AHPs** by allowing AHPs to choose whether or not to include working owners, by allowing AHPs to establish minimum participation requirements, and by allowing AHPs to limit enrollment to open enrollment periods.
- **Protect participants in self-funded AHPs** by requiring that the association have been formed for a purpose other than the provision of health insurance, clarify that states continue to have the ability to regulate the AHP, and require self-funded AHPs to register with the DOL.
- **Clarify that issuers may continue to provide administrative services to AHPs** despite the rule's prohibition on issuer ownership or control.

We discuss these recommendations in more detail in the attached Appendix.

Aetna appreciates the opportunity to comment on this Proposed Rule. We would be happy to respond to any follow-up questions you may have.

Sincerely,



Steven B. Kelmar
Executive Vice President, Corporate Affairs
Aetna

Appendix AHP Proposed Rule

I. Clarify that EGWP AHPs are permitted

Under the Proposed Rule, it appears that an AHP could offer a Medicare Advantage (“MA”) or standalone Medicare Prescription drug (“PDP”) Employer Group Waiver Plan (“EGWP”) to Medicare-eligible employees or retirees of employers of any size—e.g., an association of employees who retired from the same company could form an AHP for purposes of purchasing EGWP coverage. We believe such AHPs would be a positive option that would allow for more flexible coverage choices for retirees.

- **Recommendation: Clarify that AHPs may offer EGWPs to employment-based groups of retirees.** Explicitly providing for this option would promote flexibility and increase coverage options for older individuals. The DOL should work with CMS to the extent necessary to ensure that EGWPs may be offered through an AHP.

II. Provide rating and enrollment flexibility

One essential factor in the stability of any insurance program is the premium structure. While the aggregate level of premiums is critical, the manner in which premiums are distributed among participants is equally important. It is also important to recognize that premium rating rules do not operate in a vacuum – their impact on an insurance program depends on the presence or absence of other risk mitigating mechanisms.

The ACA disallowed the use of health status-related factors in pricing individual and small group health insurance, however, the law recognized that this change would destabilize the market unless the impact were offset by other means. Congress attempted to do this through subsidies, risk adjustment, reinsurance, open enrollment provisions and a coverage mandate. Looking back over the history of the ACA’s implementation, Aetna believes that, taking all of these mechanisms together, they have only been partially successful in offsetting the impact of the ACA’s guaranteed issue and community rating requirements.

The proposed rule would prohibit an AHP from using any health-status related factors in rating individual firms within the plan. This is despite the fact that each firm makes its own economic choice concerning whether or not to participate. The inevitable result of community rating is that participation will be more attractive to higher cost firms, and less attractive to lower cost firms. Without offsetting stabilization mechanisms – of which there are none in the proposed rule – the inevitable result will be adverse selection, leading to the destabilization of the risk pool.

Allowing sole-proprietors to participate as “working owners” exacerbates the problem. Effectively, the proposed rule envisions AHPs as private Exchanges operating without subsidies, risk adjustment, reinsurance or annual open enrollment periods. Recent history with the public

exchanges demonstrates that will not work and will quickly lead to an unstable unsustainable market.

Prior to the ACA, many states allowed limited rate variations based on experience or health status in the small group market. Typically, the amount of variation was limited to plus or minus 25 percent. This recognized the need to stabilize the market in the absence of an effective package of risk mitigation mechanisms, while at the same time limiting the impact of underwriting on consumers. Without this type of rate variation, AHPs will not offer consumers an affordable, sustainable coverage option.

➤ **Recommendations:**

- Allow AHPs to implement limited premium variations between participating employers, based on experience or health status. Such variation should be limited to +/- 25 percent.
- Allow AHPs to limit the guaranteed issuance of coverage to an annual open enrollment period.

III. Mitigate the risks of allowing working owners to participate in AHPs

We are concerned that expanding AHPs to include working owners encourages gaming and may severely damage risk pools, particularly in the individual market, which still must comply with the ACA market reforms. Allowing working owners to join AHPs, and imposing no additional requirements on them, could also create significant financial instability both within AHPs themselves and within the broader health insurance market. Therefore, we urge DOL to explicitly allow AHPs to establish their own rules around which individuals would be eligible to join the AHPs. For example, we believe that an AHP should be able to establish minimum size and participation requirements to ensure that the AHP has enough members to ensure financial stability. We also believe each AHP should be able to choose whether or not to include working owners, regardless of whether or not they pass the “commonality of interest” test in the Proposed Rule.

In addition, while we appreciate the proposal to *allow* an AHP to rely on written representations from individuals seeking to participate as working owners, we note that, in some circumstances, AHPs may have no way to determine who is genuinely a working owner. Moreover, the Proposed Rule does not specify how DOL would enforce the requirements working owners would have to meet to be eligible for AHP coverage. This lack of clarity could create a situation where individuals could game the system and attempt to seek coverage in an AHP instead of in another market (e.g., the individual health insurance market). If an AHP does not have a large or healthy enough risk pool, it could be exposed to significant risk, and enough instability among AHPs could ultimately destabilize the market. Consequently, we believe it is important for DOL to allow AHPs to establish some guardrails around coverage for working owners.

While the Proposed Rule does not expressly prohibit AHPs from establishing these guardrails, we ask DOL to confirm that AHPs are able to design coverage in a way that ensures financial stability.

➤ **Recommendations:**

- **Explicitly confirm that AHPs may choose whether or not to include working owners (e.g., sole proprietors).** In addition to the requirements provided in the Proposed Rule regarding when working employers would be eligible to join AHPs, DOL should allow AHPs to determine whether to cover working owners at all. Allowing AHPs to make this determination would give AHPs the ability to design coverage in a way that maximizes financial stability and would limit market disruption.
- **Explicitly allow each AHP to establish minimum size and participation requirements.** As noted above, it is important for AHPs to have healthy risk pools. Allowing each AHP to impose minimum group size and participation requirements would help ensure that the AHP has a viable risk pool, optimizing the AHP's potential for solvency.

Moreover, since AHPs would be treated as group coverage, allowing working owners to join AHPs could create a situation where, under current rules, working owners could obtain coverage continuously throughout the plan year. See guaranteed availability requirements for the group market at 45 CFR § 147.104(b)(1)(i)(A). Absent the provisions in this Proposed Rule, these individuals would otherwise likely be subject to the individual market open enrollment periods specified in 45 CFR § 147.104(b)(1)(ii) (citing open enrollment periods in 45 CFR § 155.410(e)). We believe that giving AHPs the option to restrict the availability of coverage to annual open enrollment periods would prevent gaming and would help ensure healthier risk pools.

- **Recommendation: Allow AHPs to limit guaranteed availability to an initial and, subsequently, an annual open enrollment period.** Aligning the open enrollment period with that of the individual market would give AHPs the option to treat working owners the same as individuals with individual market coverage. We believe that allowing for this option would prevent gaming and adverse selection.

IV. Protect participants in self-funded AHPs

The health insurance market is regulated to ensure that consumers are protected and that health insurance issuers have enough resources to cover the costs of health care. As the Proposed Rule acknowledges:

MEWAs have been particularly vulnerable to financial mismanagement and abuse. MEWA promoters sometimes have used self-insurance both to evade State oversight and to maximize opportunities for abusive financial self-dealing, often with highly negative

consequences for their enrollees. Nonetheless, DOL recognizes that well-managed self-insured AHPs may be able to realize efficiencies that insured AHPs cannot. In light of this potential, and considering the enforcement tools that the ACA added to DOL's arsenal, DOL elected to allow AHPs to continue to self-insure under this proposal. This provision will serve to further promote the establishment and growth of effective AHPs, but it will also compel DOL to commit additional resources to AHPs' oversight. 83 Fed. Reg. at 625.

While we understand DOL's position, we are concerned that this proposal could create a loophole that enables poorly managed self-funded AHPs to proliferate, ultimately creating market instability and harming consumers. This effect would be exacerbated if DOL finalizes the proposal to allow AHPs to form for the sole purpose of providing health coverage. Therefore Aetna does not support allowing AHPs to self-fund. However, if the final rule does allow AHPs to continue to self-insure, we would urge DOL to establish additional minimum requirements for self-funded AHPs to ensure that the associations are stable enough to provide sound coverage for consumers.

➤ **Recommendations:**

- **Require additional protections to ensure viability and protect consumers.** We recommend that DOL create requirements for self-funded AHPs that align with those of a bona fide association as added by HIPAA to the Public Health Service Act. See 45 CFR § 144.103. For instance, DOL should require the association to have been in business for five years and should require the association to be formed for a purpose other than obtaining insurance.
- **Clarify that states continue to have the ability to regulate self-funded AHPs.** Because states have primary regulatory authority over health insurance markets and have the statutory authority to regulate self-funded MEWAS, they are well-equipped to regulate solvency issues for self-funded AHPs. Moreover, a state is in the best position to oversee how new AHPs might affect the general strength of its health insurance market. We therefore believe that allowing states to regulate the solvency of self-funded AHPs not only would preserve the traditional role of states, but also would be the most effective way to ensure that AHPs are solvent enough to ensure consumers are protected.
- **Require that self-funded AHPs register with DOL and with the applicable state.** To ensure proper oversight, each self-funded AHP should be required to register with DOL as well as in the state in which it is situated, regardless of whether the state is regulating the AHP's solvency.

In order to protect consumers, we believe it is important to ensure that the individuals managing the AHPs and assisting the consumers in enrollment have consumers' best interest in mind.

- **Recommendation: Require a criminal background check of each self-funded AHP's fiduciary, and place a cap on broker compensation for self-funded AHPs.** These

safeguards would help ensure that those assisting with enrollment and managing AHPs are operating in the best interest of the consumers.

V. Clarify that issuers may provide AHP administrative services

One of the requirements to be considered a bona fide group or association of employers is that the group or association is not a health insurance issuer or is not owned or controlled by a health insurance issuer. See proposed 29 CFR § 2510.3–5(b)(8). “Control” is not defined. DOL should make clear that the prohibition of an issuer “controlling” a bona fide group or association does not prohibit a health insurance issuer from providing administrative services to an AHP, in a third-party administrator (“TPA”) or another similar administrative capacity. As DOL is aware, health insurance issuers typically serve as TPAs and provide administrative services to AHPs. Therefore, we ask DOL to clarify that issuers can continue to serve in this role for bona fide associations or groups.

- **Recommendation: Clarify that a health insurance issuer serving as a TPA or an administrator of a group or association is not considered to be “controlling” the group or association.** Consequently, confirm that a group or association using administrative services of an insurer can be considered “bona fide,” so long as the association meets the other requirements of the rule.

VI. Define which former employees may participate

The Proposed Rule states that AHPs would be able to provide coverage to employees and *former* employees of member employers. While the term “former employees” has traditionally included retirees and those former employees who are entitled to COBRA, ERISA does not define “former employee.” Therefore the term could be interpreted broadly to include any individual who has ever worked for an employer. We do not believe DOL’s intent was to allow any former employee of an entity, regardless of the length of time since employment, to be eligible for an AHP as a “former employee,” especially because such a broad definition would create significant adverse selection concerns in the market.

- **Recommendation: Clarify that, for purposes of eligibility to participate in an AHP, a “former employee” is a retiree of the employer as well as any individual receiving an extension of coverage that is required by state or federal law (e.g., under COBRA).** This clarification would ensure consistency across all AHPs, promoting a level playing field and preventing instability in the market.