



**Office of the President**  
Haywood L. Brown, MD, FACOG

March 6, 2018

The Honorable R. Alexander Acosta  
Secretary, U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210

Mr. Preston Rutledge  
Assistant Secretary, Employee Benefits Security Administration  
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 Assistant Secretary Rutledge:

On behalf of the American College of Obstetricians and Gynecologists (ACOG), representing more than 58,000 physicians and partners in women’s health, I appreciate the opportunity to comment in response to the proposed rule, Definition of “Employer” under Section 3(5) of ERISA – Association Health Plans. ACOG writes with strong objection to the proposed rule on Association Health Plans (AHPs). We have deep concerns that the proposed rule will weaken the individual and small group markets that are critical sources of coverage for our patients, including those with pre-existing health conditions. The effect of the rule will be lower costs and more choices for some small employers, but would increase cost and limit choice for all other employers and individuals in less-than-perfect health. Moreover, the history of AHPs is one of fraud and insolvency – leaving patients with no health coverage and unpaid medical bills.

The Department states that the proposed rule will provide additional opportunities for employer groups or associations to offer coverage alternatives to small businesses that are more affordable than insurance currently available on the individual and small group market. The only way, however, that the coverage will be more affordable is if it has fewer protections against fraud and insolvency, covers fewer benefits, or syphons healthier individuals and small groups from other markets.

As part of the implementation of the Affordable Care Act (ACA), the Centers for Medicare and Medicaid Services (CMS) provided guidance to bring AHPs in line with the standards and consumer protections in the ACA. CMS required that health insurance policies sold through an association to individuals and small employers must be regulated under the same standards that apply to the individual market or the small-group market.<sup>1</sup> Because of this guidance, known as the “look through” doctrine, the coverage was required to comply with the ACA’s protections for people with preexisting conditions and other standards, such as the essential health benefits (EHBs).

The proposed regulation would create an uneven playing field between AHPs and the individual and small-group markets. Because the rule would subject AHPs to substantially weaker standards than ACA-compliant plans, the plans could be structured and marketed to attract younger and healthier people, thus pulling them out of the ACA-compliant small-group market and leaving older, sicker, and costlier risk pools behind. If healthier individuals and small groups are syphoned from the individual and small group markets, costs will increase and plan choices will decrease for employers and individuals remaining in those markets. Consumers who need comprehensive coverage, such as plans that include maternity care, and consumers with incomes too high to qualify for subsidies, would face rising premiums and potentially fewer plan choices.

Based on these concerns and those provided below, we strongly urge the Department of Labor (“the Department”) to withdraw this rule. However, if the Department of Labor moves forward with finalizing this rule, we strongly urge you to maintain the nondiscrimination provisions. We also strongly oppose any effort to limit states’ full authority to regulate AHPs. Both are critical to mitigate the damage that the proposed rule will cause for insurance markets and consumers themselves.

### **Maintain the “Look-through” Doctrine**

Currently, AHPs are regulated by the “look-through” doctrine set forth in 2011 guidance from CMS.<sup>2</sup> This guidance has the effect of looking through the association to understand who is purchasing coverage through an AHP, and then to determine regulation of the insurance products. Currently, AHP products sold to individuals are considered to be individual market insurance and AHP products sold to small employers are considered to be small group market insurance. The insurance products are then subject to the same requirements and consumer protections that exist in those markets under the ACA.

The proposed regulation would not apply the “look-through” doctrine to AHPs that fit the new definitions of associations in the rule. As a result, an AHP would be treated as a single plan providing large employer coverage, and therefore exempted from the individual and small group market protections.

By exempting an AHP from the look-through doctrine, plans offered to working owners and small employers would be exempt from the requirement to provide all EHBs. Individuals and small employers would not necessarily have coverage that includes benefits such as maternity care, prescription drugs, and mental health and substance use disorder services. We are extremely concerned that this will take consumers and patients back to the days before the ACA, when plans frequently failed to meet the needs of women and their families.

As a result of this proposed rule, AHPs could substantially scale back their benefits, dropping benefits entirely or dramatically limiting them. Limiting plan benefits was a predatory practice that existed before the ACA as a way to discourage anyone with a pre-existing health condition or high expected health care utilization from enrolling in coverage. For example, before the ACA:

- The vast majority of plans in the individual market did not cover maternity care. In fact, only 12 percent of plans in the individual market covered this benefit.<sup>3</sup> Even among plans that covered maternity services, the coverage was not always comprehensive or affordable. One study found that several plans charged a separate maternity deductible that was as high as \$10,000, and some plans had waiting periods of up to a year before maternity care would be covered.<sup>4</sup>

- One in five people enrolled in the individual market lacked coverage for prescription drugs.<sup>5</sup> Rolling back coverage of prescription drugs means women would not be able to access the medicine they need to prevent or manage ongoing health conditions.
- Mental health coverage was often excluded from plans, or was very limited.<sup>6</sup> Women experience greater behavioral health burdens and are twice as likely as men to say they have been diagnosed with a mental health issue (29 percent of women versus 15 percent of men) so a weakening of this consumer protection is of deep concern to obstetrician-gynecologists (ob-gyns) who may need to refer patients who screen positive for mental health problems or substance use disorders to behavioral health providers.<sup>7</sup> It is estimated that over 32 million people gained access to coverage for mental health services, substance use disorder treatment or both benefits under the ACA.<sup>8</sup>

The proposed rule puts the economic stability and health of consumers at risk by allowing employers to offer limited coverage that fails to meet the needs of individuals and families. For example, a small employer, for example, with a relatively healthy workforce might offer an AHP with low premiums but that also provides limited benefits. If an employee later develops a health condition, such as cancer or HIV, or requires hospitalization – she could suddenly find that necessary care or treatment is not covered.<sup>9</sup>

While the proposed rule prevents health status rating of separate employers, the rule appears to allow groups or associations to base premium rates on any other factor, including gender, age, industry and other factors actuaries create to estimate health care utilization. Plans would be exempt from the rating protections that apply to individual and small group markets. Small businesses with a workforce that is older, disproportionately women, or in industries that are believed to attract high health care utilizers would suffer the most.

Currently, because of the ACA protections, plans are prohibited from basing premiums on anything other than age (within a 3:1 ratio for adults), tobacco use, family size, and geography. As one example of problematic rating practices before the ACA took effect, 92 percent of best-selling plans on the individual market practiced gender rating, costing women approximately \$1 billion a year.<sup>10</sup> While the proposed rule would protect individuals from being charged more because of their gender, it appears that employers with higher rates of female employees could be charged higher premiums, which would ultimately be passed down to their employees.

**ACOG Recommends:** Continue to apply the “look-through” doctrine, rather than treat AHPs as large group plans; if an AHP is offering coverage to individuals, including working owners, or small employers, the plans should be required to meet standards and protections set forth in the ACA.

### **Notice Requirements**

We appreciate the Department’s request for information about required notices. AHPs should be required to provide notice to employer groups and potential beneficiaries if plans do not meet standards for minimum value. This will ensure that employer groups and employees know that the plans are less comprehensive than health plans available in the individual or small group markets. Further, if the AHP does not meet minimum value, the employees and their dependents must be made aware of their right to receive coverage through the health insurance marketplaces, potentially with premium tax credits based on their income. Similarly, AHPs should be required to notify employer groups and potential beneficiaries of any EHBs not covered by their plans. The Department should also clarify that all notice

requirements that apply to group health plans apply to plans under this regulation, including notice of appeal rights, summary of benefits and coverage, and summary plan descriptions.

**ACOG Recommends:** Require that plans notify employer groups and potential beneficiaries that plans do not meet minimum value standards and do not cover various EHBs, as applicable.

### **Discrimination Protections**

We are pleased that the proposed rule applies the HIPAA nondiscrimination provisions in § 2590.702(a) and § 2590.702(b) to AHPs. The nondiscrimination provisions prevent AHPs from discriminating based on health status-related factors against employer members or employers' employees or dependents. As proposed, this would prevent AHPs from using health factors to determine eligibility for benefits or in setting premiums. Health factors include: health status, medical condition, claims experience, receipt of health care, medical history, genetic information, evidence of insurability, or disability. We applaud this proposal, as it is essential to help protect both employers and their employees from discrimination based on health status. If this rule is finalized, we strongly encourage the Department to retain this requirement. We support this provision applying to all AHPs, regardless of when in time they were established. AHPs currently in operation should be required to fully comply with nondiscrimination requirements, without exception and without delay.

While this is an important provision of the proposed regulation, it does not go far enough because an AHP can engage in other practices that result in discrimination against people with medical needs. The proposal exempts AHPs from ACA consumer protections designed to protect people with preexisting conditions. An AHP would be exempt from EHB provisions, rate reforms, guaranteed issue, and single-risk pool requirements. Consequently, an AHP can simply avoid covering people and businesses with medical needs. Using benefit design, an AHP can attract healthier groups. For example, individuals and small employers would not necessarily have access to coverage that includes maternity, mental health benefits, and expensive prescriptions. People who need such coverage would not enroll in AHP coverage. Also, an AHP could discriminate in rates, charging women higher rates than men, charging smaller businesses higher rates than larger businesses, charging businesses in certain industries higher rates, and charging older people higher rates without limit. Rating practices would result in healthier groups being covered through an AHP.

Furthermore, an AHP could engage in marketing practices targeted at attracting healthier people. An AHP could avoid a geographic area where there is a high incident of cancer rates, heart disease, and diabetes and thereby avoid covering sicker populations. Its geographic location can also be used to engage in redlining practices. An AHP could limit membership to a specific industry that has lower claims than other industries. All of these, and other discriminatory practices, would be allowed because AHPs would be exempt from EHB, rate reforms, and guaranteed issue requirements.

In order to more meaningfully prevent discrimination, the Department should also strengthen the protections in this provision by preventing groups or associations from varying premium rates to different employer members based on gender, age, zip code or other geographic identifier, industry, or other factor that may be used to vary rates based on expected health care utilization. The final rule should also apply EHB, guaranteed issue and single-risk pool requirements. The single-risk pool requirement is an important way to ensure that AHPs, where they exist, do not result in a segmented market.

Failure to extend these protections, in addition to protections against discrimination based on health status, to AHPs will expose employers and their employees to discriminatory practices, including discriminatory rating and marketing practices. Failure to extend these protections will also place the regulated health insurance markets in jeopardy, as AHPs would be free to cherry pick healthy consumers out of the regulated markets, leaving those markets to fail as the risk pool worsens and premiums spiral out of control.

**ACOG Recommends:**

- Retain protections that would prohibit discrimination based on health status-related factors against employer members or employers' employees or dependents.
- Require AHPs to comply with EHB provisions, rate reforms, guaranteed issue, and single-risk pool requirements.

Thank you for this opportunity to comment in response to the proposed rule, Definition of "Employer" under Section 3(5) of ERISA – Association Health Plans. We encourage the Department to withdraw this rule immediately. If you have any questions or concerns about our recommendations, please contact Elizabeth Wieand, Program Director of Payment and Delivery System Policy, at [ewieand@acog.org](mailto:ewieand@acog.org) or 202-314-2356.

Sincerely,



Haywood L. Brown, MD, FACOG  
President

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<sup>1</sup> The Center for Medicare and Medicaid Services. (2011, September1.) "Application of Individual and Group Market Requirements under Title XXVII of the Public Health Service Act when Insurance Coverage Is Sold to, or through, Associations." Retrieved 8 February 2018, from

[https://www.cms.gov/CCIIO/Resources/Files/Downloads/dwnlds/association\\_coverage\\_9\\_1\\_2011.pdf](https://www.cms.gov/CCIIO/Resources/Files/Downloads/dwnlds/association_coverage_9_1_2011.pdf)

<sup>2</sup> The Center for Medicare and Medicaid Services. (2011, September1.) "Application of Individual and Group Market Requirements under Title XXVII of the Public Health Service Act when Insurance Coverage Is Sold to, or through, Associations." Retrieved 8 February 2018, from

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<sup>3</sup> National Women's Law Center. (2012). Turning to Fairness: Insurance Discrimination against Women Today and the Affordable Care Act. Retrieved 14 December 2016, from

[http://www.nwlc.org/sites/default/files/pdfs/nwlc\\_2012\\_turningtofairness\\_report.pdf](http://www.nwlc.org/sites/default/files/pdfs/nwlc_2012_turningtofairness_report.pdf)

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<sup>4</sup> National Women’s Law Center. (2012). Turning to Fairness: Insurance Discrimination against Women Today and the Affordable Care Act. Retrieved 14 December 2016, from [http://www.nwlc.org/sites/default/files/pdfs/nwlc\\_2012\\_turningtofairness\\_report.pdf](http://www.nwlc.org/sites/default/files/pdfs/nwlc_2012_turningtofairness_report.pdf)

<sup>5</sup> Palanker, D., Volk, J., & Giovannelli, J. (2017, March 15). *Eliminating Essential Health Benefits Will Shift Financial Risk Back to Consumers*. The Commonwealth Fund. Retrieved 23 March 2017, from <http://www.commonwealthfund.org/publications/blog/2017/mar/eliminating-essential-health-benefits-financial-risk-consumers>

<sup>6</sup> Palanker, D., Volk, J., & Giovannelli, J. (2017, March 15). *Eliminating Essential Health Benefits Will Shift Financial Risk Back to Consumers*. The Commonwealth Fund. Retrieved 23 March 2017, from <http://www.commonwealthfund.org/publications/blog/2017/mar/eliminating-essential-health-benefits-financial-risk-consumers>

<sup>7</sup> PerryUndem Research & Communication, “Examining the Mental Health Care Needs and Preferences of Women Ages 18 to 44.”

<sup>8</sup> U.S. Department of Health & Human Services. (2013, February). *Affordable Care Act Will Expand Mental Health and Substance Use Disorder Benefits and Parity Protections for 62 Million Americans*. Retrieved 23 March 2017, from [https://aspe.hhs.gov/sites/default/files/pdf/76591/rb\\_mental.pdf](https://aspe.hhs.gov/sites/default/files/pdf/76591/rb_mental.pdf)

<sup>9</sup> Lueck, S. (2018, January 8.) *Trump Rule on Association Health Plans Could Devastate Small-Group Markets*. Retrieved 8 February 2018, from <https://www.cbpp.org/blog/trump-rule-on-association-health-plans-could-devastate-small-group-markets>

<sup>10</sup> National Women’s Law Center. (2012). Turning to Fairness: Insurance Discrimination against Women Today and the Affordable Care Act. Retrieved 14 December 2016, from [http://www.nwlc.org/sites/default/files/pdfs/nwlc\\_2012\\_turningtofairness\\_report.pdf](http://www.nwlc.org/sites/default/files/pdfs/nwlc_2012_turningtofairness_report.pdf)