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John Lovelace, Chairman | Margaret A. Murray, Chief Executive Officer

March 6, 2018

Preston Rutledge, Assistant Secretary
Employee Benefits Security Administration
Department of Labor

Submitted electronically via: www.regulations.gov

RE: RIN 1210–AB85

Dear Assistant Secretary Rutledge:

The Association for Community Affiliated Plans (ACAP) respectfully submits comments regarding *EBSA Definition of “Employer” under Section 3(5) of ERISA – Association Health Plans*.

ACAP is an association of 61 not-for-profit and community-based Safety Net Health Plans (SNHPs) located in 29 states. Our member plans provide coverage to more than 20 million individuals enrolled in Medicaid, the Children’s Health Insurance Program (CHIP) and Medicare Special Needs Plans for dually-eligible individuals, including over 700,000 Marketplace enrollees. Nationally, Safety Net Health Plans serve almost half of all Medicaid managed care enrollees. Fourteen of ACAP’s Safety Net Health Plan members offer qualified health plans (QHPs) in the Marketplaces in 2018.

Summary of ACAP’s Comments

ACAP has chosen to respond to a subset of proposals in the proposed rule that are particularly relevant to Safety Net Health Plans (SNHPs). ACAP appreciates the Administration’s recognition of the importance of access to affordable health insurance coverage and recognition of the need for consumer protections in doing so. ACAP’s comments are focused on ensuring that there are adequate consumer protections in place and that there is not a resulting deleterious impact on the individual market risk pool that would cause premiums to spike for Qualified Health Plans (QHPs) offering coverage in the Marketplaces. Only a limited number of ACAP’s member plans offer small group coverage, so our comments herein are focused predominantly in the impact to the individual market. Specifically, our comments are focused so as not to place undue burden or harm on either SNHPs or consumers, in particular the low-income and vulnerable populations that are traditionally served by these SNHPs.



In particular, we wish to draw attention to the following sections of our comments:

- **Risk Pooling: Nondiscrimination Protections & Administrative Efficiencies:** *ACAP supports the nondiscrimination requirements as set out by the Administration but firmly believes that other protections, to align with those akin to QHP offerings, are warranted. In addition, ACAP does not believe that AHPs will be able to achieve sufficient administrative efficiencies to make a difference in premium savings.*
- **State Regulation:** *ACAP urges the Department not to permit any exception to State regulatory authority of AHPs.*
- **Benefit Package Notice Requirements:** *ACAP urges the Department to develop notice requirements for employers and employees who may potentially enroll in an AHP to ensure they are aware of the differences between AHP and QHP benefit packages.*
- **Evaluation:** *ACAP urges the Department to develop a thorough set of evaluation criteria and to reevaluate this regulation over the coming 2-3 years, to ensure it is not having a detrimental effect on the individual and small group market risk pools or a dilatory impact on the cost and quality of plans available to consumers—both those enrolled in AHPs and in individual and small group market plans.*

Expanded Comments

ACAP's comments are expanded below, with additional background.

Risk Pooling: Nondiscrimination Protections & Administrative Efficiencies

The Department notes that “The proposed rule contains provisions designed to prevent potentially adverse impacts on individual or small group risk pools that might otherwise carry social costs.” We appreciate the recognition of this risk, however, we remain concerned that the included provisions are insufficient to prevent a significant negative impact on the individual market and small group risk pools due to adverse selection.

ACAP strongly supports the nondiscrimination provisions included in the proposed regulation; however, we believe additional protections are warranted. Mirroring HIPAA rules is a good starting point, as far as making sure Associations do not restrict membership on any health factor, however, this leaves open a propensity for gaming in other ways, which will ultimately impact risk pooling in other markets.

For example, the HIPAA rules that prohibit health discrimination *within* certain groups of similarly situated individuals, but not *across* different groups of similarly situated individuals,



are conducive to gaming. Although it prohibits classifications of groups based on any health factor, such classifications may not be overtly discriminatory but are still effectively so—as part-timers versus full-time workers may well have significantly different health statuses and needs in certain industries, or workers in differing locations may have different health statuses and needs based on their specific location. We do, however, believe it is vitally important that any Associations not treat member employers as distinct groups and support the Administration’s proposal in (d)(4) to do so. As the Administration notes, permitting employer-by-employer risk rating would be contrary to the goal of supporting the health needs and interests of the employers and ultimately Associations doing so would simply function as entities that underwrite risk—that is, as traditional commercial insurers rather than as an Association.

Similarly, without nondiscrimination protections akin to those applicable to QHPs, Associations will be able to partake in gaming by offering benefit packages that are discriminatory in nature. Without requirements to cover particular categories of services or benefits then Association Health Plans (AHPs) will be able to design their product offerings and drug formularies to exclude high-cost conditions such as cancer, HIV, hepatitis, and more. A proliferation of AHPs participating in such practices would lead to only the healthiest employees participating in the AHP, leaving high-utilizers with chronic or high-cost conditions remaining in the individual market—creating significant risk segmentation and increasing premiums in the individual market. We thereby disagree vehemently with the Department’s assertion that the “nondiscrimination rules and *potential* [emphasis added] for administrative savings would mitigate any risk of adverse selection against individual and small group markets.”

We would also like to assert that, as the Department acknowledges throughout the preamble, any administrative savings efficiencies are only potential and are purely speculative in nature. As not-for-profit insurers focused on creating efficiencies and managing care, we do not believe AHPs will be able to find significant administrative efficiencies as compared to not-for-profit managed care plans.

ACAP supports the nondiscrimination requirements as set out by the Administration, however, we urge the Department to also apply nondiscrimination requirements to the actual AHP product offerings, so that the AHPs do not effectively discriminate against unhealthy enrollees within their member employer groups.

Based on the experience of its safety net, not-for-profit managed care member plans (which tend to have the highest medical loss ratios of all managed care organizations in the Medicaid program), ACAP does not believe that AHPs will be able to achieve sufficient administrative efficiencies to make a difference in premium savings.



State Regulation

AHPs have long been victim to fraudsters and bad actors selling shoddy coverage and insolvent products that are unable to pay claims due. We appreciate the Administration’s recognition of the need to prevent such actors forming Associations solely for this purpose, however, we remain concerned about the limited oversight of AHPs. While there are proposed requirements for the organizational structure of the Association to ensure that it acts “in the interest” of the employers and their employees, this simply seeks to ensure that a commercial or unlicensed insurance plan is not masquerading as an AHP—and this alone does not ensure adequate protections.

The Department solicits feedback about potential exemptions from ERISA section 514(b)(6)(B) specifically in regard to State insurance regulation functions. Given the historical abuses associated with AHPs and Multiple Employer Welfare Arrangements (MEWAs), we urge the Department to prohibit any such exemptions from State regulation, as this would be one of the few safeguards to protect enrolled consumers—both from bad actors and inadvertent insolvency. Additionally, strong state and federal oversight is the only way to ensure a level playing field for all insurers.

Significant state and federal oversight will be vital to ensuring the success of any AHPs and in ensuring consumers are not subject to the scams and abuses of the past. We urge the Department not to permit any exceptions to state regulatory authority of AHPs.

Benefit Package Notice Requirements

As noted within the preamble, although individual, small group, and large group plans are subject to the requirement of guaranteed issue, plans in the individual and small group markets are subject to several further compliance obligations under both the Affordable Care Act (ACA) and other State and Federal insurance laws. Given one intent of the proposed rule is to allow newly formed AHPs to “offer group health coverage regulated under the ACA as large group coverage,” ACAP urges the Department to ensure that regulatory differences between QHPs and AHPs—which could affect both the risk pool and member benefit packages—are examined and outlined through notice requirements.

The large group market is exempt from the single risk pool requirement as well as the risk adjustment program. Because, as noted in above in this comment, Associations could partake in gaming of benefits despite the nondiscrimination rules regarding health factors, AHPs could effectively siphon healthy, less costly consumers from the existing individual and small group market pools. Without a risk adjustment mechanism in place, this would result in the deterioration of the risk pools of the individual and small group markets.



In addition, plans in the large group market are neither required to offer benefit packages that include the ten essential health benefits (EHBs), nor are they prohibited from varying premiums (except with respect to location, age banding, family size, and some tobacco use limits). Therefore, although the nondiscrimination protections would prevent an AHP from excluding an individual based on any health factor, the Association could enroll this same individual and charge him or her a higher premium than other members because the AHP is regulated in the large group market and is exempt from the ACA's rating restrictions. Such differences in benefit design should be thoroughly explained and presented to consumers who may be deciding between QHP and AHP coverage.

Given the difference in statutory and regulatory requirements that AHP plans must comply with as compared to QHPs, particularly the potential difference in benefit packages, ACAP urges the Department to develop notice requirements for employers and employees who may potentially enroll in an AHP to ensure they are aware of the differences between AHPs and QHPs.

Evaluation

Included in the Regulatory Impact Analysis of the proposed rule, the Department identifies a number of issues and areas that make evaluating the impact of the regulation difficult, including a lack of data. Given the current political uncertainty in the individual market combined with a lack of data that makes it impossible to truly predict the impact this regulation would have, we urge the Department to lay out a process for re-evaluating the regulation in the coming years. Evaluation criteria should include: scope of benefits and cost-sharing provided under AHP plans, impact on the individual and small group market risk pools (i.e., are they effectively functioning as high-risk pools because healthy consumers have moved to AHPs, thereby driving up premiums in the individual and small group markets), whether newly formed AHPs are fully or self-insured, financial solvency, and state regulatory oversight, to name a few.

ACAP urges the Department to develop a thorough set of evaluation criteria and to reevaluate this regulation over the coming 2-3 years, to ensure it is not having a detrimental effect on the individual and small group market risk pools or a dilatory impact on the cost and quality of plans available to consumers—both those enrolled in AHPs and in individual and small group market plans.

Conclusion



ACAP thanks EBSA for its willingness to consider the aforementioned issues and discuss these issues with us. If you have any additional questions or comments, please do not hesitate to contact Heather Foster (202-204-7508) or hfoster@communityplans.net.

Sincerely,

/s/

Margaret A. Murray
Chief Executive Officer