NEW YORK STATE
DEPARTMENT *of*
FINANCIAL SERVICES

Andrew M. Cuomo
Governor

Maria T. Vullo
Superintendent

March 2, 2018

R. Alexander Acosta
Secretary of Labor
Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

RE: Definition of Employer - Small Business Health Plans RIN 1210-AB85

Dear Secretary Acosta:

The New York State Department of Financial Services (NYSDFS) submits the following comments on the proposed regulation for 29 CFR Part 2510; Employee Benefits Security Administration, Definition of "Employer" under section 3(5) of ERISA - Association Health Plans [RIN 1210-AB85] (AHP Proposed Rule).

As currently written, we believe the AHP Proposed Rule does not preempt state law or regulation. As such, because state regulation is crucial to preserving affordable, quality small group coverage that protects consumers, we believe the AHP Proposed Rule is unnecessary. Further, we believe the AHP Proposed Rule could not legally be modified to preempt state law and/or permit the sale of AHPs across state lines, as it is the authority of state governors, legislators and regulators to set rules and oversee AHPs. Moreover, any attempt at preemption would shift costs to consumers and small businesses – as well as providers, brokers and regional insurers – as AHPs would have free reign to "cherry pick" healthy individuals and businesses, causing rates to spike for everyone else. Such an effort would also harm local insurers and undermine competition within states, which are the primary regulators of insurance markets. For these reasons, detailed further below, NYSDFS submits that the AHP Proposal Rule, if it proceeds, should maintain the clear position that it does not change in any way state authority over AHPs.

Generally, NYSDFS supports proposals that provide States with increased flexibility to build on what New York has already achieved under the Affordable Care Act (ACA). New York's healthcare market continues to be robust, with 14 issuers offering individual coverage, 20 issuers offering small group coverage, and consumers in every county having a choice of coverage. New York will continue to make progress and further the gains of the ACA: lower rates, better coverage, and a healthier individual market.

However, NYSDFS does not support proposals that purport to provide State flexibility but, in reality, may destabilize the markets, decrease consumer protections, and undermine protections of comprehensive health care at affordable prices. NYSDFS does not support any rule that attempts to preempt state regulation of insurance, or undermine the ACA's important protections.

The AHP Proposed Rule Preserves State Regulation

The AHP Proposed Rule unequivocally and rightly confirms that Association Health Plans created under the Proposed Rules are still Multiple Employer Welfare Arrangements (MEWAs) and thus are fully regulated by the states. The provisions in ERISA that preserve state regulatory authority over MEWAs are not modified in this proposed rule and existing state authority is not changed. Throughout the preamble, DOL repeatedly confirms that nothing in the AHP Proposed Rule prohibits states from regulating (1) association health plans (AHPs) in the same manner as any other MEWA pursuant to ERISA section 3(40) or (2) self-funded AHPs in the same manner as other insurers as permitted by the ERISA "Savings Clause." DOL expressly states:

> *The proposed rules would not alter existing ERISA statutory provisions governing MEWAs. The proposed rules also would not modify the States' authority to regulate health insurance issuers or the insurance policies they sell to AHPs... ERISA section 514(b)(6) gives the Department and State insurance regulators joint authority over MEWAs (including AHPs described in this proposed rule), to ensure appropriate consumer protections for employers and employees relying on an AHP for healthcare coverage. (83 FR 625)*

NYSDFS fully supports retaining existing state authority over MEWAs and AHPs. Indeed, NYSDFS believes that any attempt at preemption by rule-making would be unlawful and ineffective, as only Congress could amend ERISA to permit such result (which we believe it should not do).

ERISA and the Importance of State Regulation

The importance of maintaining state regulation and supervision of MEWAs is critically important given the history of these arrangements under ERISA. When Congress enacted ERISA in 1974, it expressly permitted states to regulate the business of insurance under the "Savings Clause." As initially enacted, ERISA created an exception to state insurance regulation for multiple employer arrangements. The provisions in ERISA related to multiple employer arrangements sought to give small employers access to lower cost health coverage on terms similar to those available to large employers. However, such arrangements were plagued with problems. As a result, in 1983, Congress enacted the Erlenborn-Burton Amendment to add a new section 3(40) to ERISA to grant states full authority to regulate associations and trusts of multiple employers as MEWAs.

Prior to the Erlenborn-Burton Amendment, multiple employer arrangements were rife with fraud, fiscal mismanagement and insolvency. Various third-party promoters viewed multiple employer arrangements as profit-making opportunities, claiming ERISA preemption of state laws, whether or not the arrangement was a legitimate ERISA plan. Multiple employer arrangement promoters took advantage of the regulatory void and made money at the expense of

their participants. Many such arrangements became insolvent, whether through malice or incompetence, resulting in significant sums of unpaid claims and the loss of health insurance for many participants.

With this important backup, Congress recognized that states were in the best position to protect their citizens and thus expressly authorized states to regulate these types of multiple employer arrangements as MEWAs. Since the enactment of the Erlenborn-Burton Amendment in 1983, New York has successfully protected its citizens and the integrity of its small group and individual health insurance markets that would otherwise be adversely affected by unregulated MEWAs. Continued state supervision of MEWAs is a cornerstone in the law and should not be undermined by any new Rule.

Any Preemption of State Regulation Would Be a Disaster

As noted, NYSDFS strongly objects to any modification of the AHP Proposed Rule that would attempt to preempt or impact full state regulation of AHPs in any way. As an initial matter, we believe any such modification would be contrary to law and would require Congressional action. As a matter of policy, such modification would have a devastating impact on New York's small group and individual insurance markets. Some examples of the negative impacts that unregulated AHPs would have include the following:

Detrimental Impact on Individual and Small Group Markets. Any proposal to exempt AHPs from state regulation would negatively impact individual and small group markets, as small employers and self-employed individuals would band together for the sole purpose of obtaining health coverage without being subject to New York's rating rules. AHPs would adversely select against the individual and small group markets by attracting employers and individuals with healthier employees while leaving employers and individuals with less healthy employees in the fully-insured, community-rated small group and individual markets. Their removal would result in significant premium rate increases for the membership in those markets. This worsening of risk could also result in issuers withdrawing from the individual and small group markets, leaving consumers with less choice and higher premiums.

Sales Across State Lines. New York strongly opposes any attempt to permit sales across state lines and submits that only Congress could implement any such change in law. Any exemption of AHPs from state regulation would interfere with state autonomy over their markets and result in a "race to the bottom" with AHPs delivering policies in states with the least amount of state regulation to consumers across the country. Sales across state lines would violate state-based insurance regulation and result in coverage contrary to New York's laws and consumer protections, and would harm regional and local insurers.

Nondiscrimination Rules Insufficient. The preamble to the Proposed Rule relies exclusively on the nondiscrimination rules to protect against underwriting based on health status to address concerns regarding adverse selection against the individual and small group markets. However, the nondiscrimination provisions are insufficient to protect the integrity of these vulnerable markets. If the Proposed Rule were modified to seek to exempt AHPs from state law and regulation (which we believe would be unlawful), it would allow employers to band together for the sole purpose of providing health coverage, promoting anti-selection and siphoning away good risk from the community rated pools. AHPs formed based on common industry or

geographic area would permit the selection of good risks by allowing employers with healthier employees or in healthier industries to join AHPs, while excluding employers in less healthy industries or geographic areas, with significant negative consequences.

Exempting Self-Funded MEWA Plans from State Regulation Would Harm Consumers. In the preamble, DOL asks if it should exempt certain self-funded MEWAs from state regulation. DFS strongly objects to exempting self-insured MEWA plans from state insurance regulation. Self-insured MEWA plans are risk-bearing entities that should be regulated by states as insurance entities as provided by the ERISA "Savings Clause." Exempting self-insured MEWA plans from state oversight would be contrary to law and would result in a proliferation of unregulated associations that collect hundreds of millions of dollars and act as issuers, while not being subjected to any state financial oversight, solvency or consumer protections applicable to traditional issuers (e.g., rating rules, actuarial value requirements, mandated benefits, external appeals, prompt payment of claims, network adequacy, etc.). Furthermore, exempting self-funded MEWAs from state regulation would result in massive "cherry picking" of good risk out of the individual and small group risk pools, which would devastate the fully-insured markets and drive regional and local not-for-profit insurers out of business. Such action would destroy competition, be catastrophic to the fully-insured market, hurt doctors and hospitals, and be detrimental for any consumers who are not young, male and healthy.

Permitting AHPs to Offer Less Comprehensive Products Leads to Further Harm. New York law requires all small group employers and individuals to be issued coverage providing for full Essential Health Benefits (EHB) and other consumer protections, regardless of whether the coverage is purchased through an association. If the Proposed Rule were modified, AHPs seeking to offer coverage with less comprehensive benefit packages would violate New York law and create an unlevel playing field in the small group and individual markets. The policies issued to AHPs would be large group policies, further exacerbating the adverse selection against the individual and small group markets. Consumers would be surprised to find that health coverage through the AHPs is significantly less generous than the coverage they have enjoyed in the individual and small group markets. For these reasons, New York law prohibits the practice.

Effective Date of Final Rule and its Negative Impact on Premiums. If the Proposed Rule is adopted, it should be effective no earlier than 2020, since issuers are currently engaged in calculating premium rates for 2019 coverage. An even later effective date would allow state regulators and issuers time to assess any impact of the regulation on the individual and small group markets. Failure to provide regulators and issuers with adequate time to assess the impact of the Rule will cause volatility and uncertainty, leading to excessive premium rate increases, as issuers calculate rates conservatively to account for the uncertain impact AHPs would have on the risk pools.

Conclusion

NYSDFS strongly urges DOL to reconsider adopting this AHP Proposed Rule as it is unnecessary and could detrimentally impact the existing state-based regulatory framework. Most importantly, in any Rule, existing state authority over MEWAs and AHPs must be maintained, else the Rule would be contrary to law and would have a drastic and catastrophically negative impact on the individual and small group health insurance markets in New York and across the country. Further, if the AHP Proposed Rule is adopted, the effective date should be moved forward to avoid disruption.

Thank you for your consideration of these comments.

Very truly yours,

Maria T. Vullo
Superintendent of Financial Services