Credit Union Consortium

March 5, 2018

R. Alexander Acosta
United States Department of Labor
900 Constitution Avenue NW
Washington, DC 20210

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

Dear Secretary Acosta:

The Credit Union Consortium (the "Consortium") appreciates the opportunity to submit comments on the proposed rule issued by the United States Department of Labor (the "Department") on January 5, 2018. On behalf of the Consortium, I submit the following comments for the Department's consideration.

A. Overview of the Credit Union Consortium

On September 15, 2017, five Indiana credit unions formed the Consortium. Membership in the Consortium subsequently expanded to eighty three additional Indiana credit unions. The Consortium is governed by nine trustees who were nominated and elected by the participating credit unions. The Consortium is intended to comply with guidance issued by the Department in May 2017.[1]

It is my belief that the Consortium currently complies with all of the criteria to be a "bona fide group or association of employers" under the proposed rule, except one. To constitute a bona fide group or association of employers, "[t]he group or association and health coverage offered by the group or association [must comply] with the nondiscrimination provisions of paragraph (d) of this section."[2] This requirement is new and inconsistent with current regulations published by the

[1] Op. Dep't of Labor No. 2017-02AC (May 16, 2017).
[2] Definition of "Employer" Under Section 3(5) of ERISA – Association Health Plans, 83 Fed. Reg. 614, 635 (proposed January 5, 2018)(to be codified at 29 C.F.R. pt. 2510.3-5(b)(7)).

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Department. The trustees believe that this new requirement will have a significant, negative impact on the Consortium and its members.

B. HIPAA Prohibits Discrimination Against Participants and Beneficiaries Based On a Health Factor

HIPAA generally prohibits group health plans and health insurance issuers from discriminating against individuals with regard to eligibility, premiums, or contributions on the basis of specified health status-related factors.[3] However, the HIPAA regulations at 29 CFR § 2590.702 specifically provide that group rating based upon health factors is permissible. The pertinent provision provides:

> (2) Rules relating to premium rates –
>
> > (i) Group rating based upon health factors not restricted under this section. Nothing in this section restricts the aggregate amount that an employer can be charged for coverage under a group health plan. But see § 2590.702-1(b) of this Part, which prohibits adjustments in group premium or contribution rates based upon genetic information.

C. AHP Proposed Regulation

The proposed rule states that "in applying the HIPAA/ACA health nondiscrimination rules for defining similarly-situated individuals, the group or association may not treat member employers as distinct groups of similarly-situated individuals."[4] The Department explains that if an AHP could treat different employer-members as different bona fide classifications, it could render the nondiscrimination provisions ineffective. Specifically, AHPs could charge some employer members higher premiums based on the health status of the employers' employees and dependents.

The prevailing sentiment in the proposed rule is that AHPs should not offer advantages that are not available in the individual and small group markets. Since the ACA imposes restrictions on health rating for the individual and small group insurance markets, the Department believes that restrictions should also be imposed upon AHPs to mitigate risk selection issues. It is important to note that these restrictions already apply to individual and small groups that participate in fully insured association plans.[5]

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[3] 29 CFR § 2590.702 (2017).
[4] Definition of "Employer" Under Section 3(5) of ERISA – Association Health Plans, 83 Fed. Reg. 614, 624 (proposed January 5, 2018)(to be codified at 29 C.F.R. pt. 2510).
[5] *Supra* note 4.

The Department specifically solicited comments on the above described nondiscrimination requirements. I urge the Department to account for two important realities that the proposed rule failed to address:

1. The group rating restrictions under the ACA do not apply to large groups. However, the proposed AHP regulation would apply the group rating restrictions to all participating employers, including large groups. This new rule would impose restrictions upon AHPs that are not applicable to large group health insurance carriers.

2. The group rating restrictions do not currently apply to self-funded plans. It is permissible, under current law, for a self-funded AHP to take into account the claims experience of each participating employer when setting rates. If the proposed rule is imposed, it is likely that some employers with positive claims experience will elect to terminate coverage in an AHP and instead establish separate self-funded health plans to avoid the negative impact that such adverse selection would have on the cost that would have to be absorbed by their employees.

D. Proposed Rule Will Negatively Impact AHPs

Without modifications, the proposed rule will negatively impact AHPs in the following ways:

1. The rule creates an unequal and unfair playing field with respect to large employers. Insurance carriers are permitted to establish premiums for large employers based upon health factors. However, in the context of an AHP, group rating will not be allowed, apparently whether the AHP provides fully insured or self-funded coverages.

2. Some existing AHP participating employers will experience significant premium increases. Current law allows AHPs to utilize health factors in establishing rates for individual employers (except for fully insured individual and small groups). However, a change in law will result in rebalancing, where the premiums for employers with healthier employees may need to be increased dramatically if their positive experience cannot be considered.

3. The resulting premium increases will destabilize the AHP market. Employers that experience large premium increases in AHPs may elect to establish separate self-funded plans. The withdrawal of employers with healthier experience from AHPs will result in premium increases for the remaining employers. Note that even the Department acknowledges that the proposed rule "could destabilize the AHP market or hamper employers' ability to create flexible and affordable coverage options for their employees."[6]

4. The proposed rule will discourage AHP employers from undertaking wellness initiatives. If positive claim experience is effectively irrelevant in setting rates, many employers will be reluctant to spend money to encourage employees to live healthier lives. In addition,

[6] Definition of "Employer" Under Section 3(5) of ERISA – Association Health Plans, 83 Fed. Reg. 614, 624 (proposed January 5, 2018)(to be codified at 29 C.F.R. pt. 2510).

fewer employees will be willing to participate in wellness initiatives if the effort does not result in financial savings.

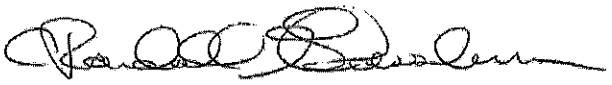
5. Finally, Section 1.10 of the proposed rule notes the Department's concern with historical MEWA mismanagement and the potential for new MEWAs to leave "participants and providers with unpaid benefits and bills." We respect and support this sentiment and note our AHP is already regulated by the State of Indiana. The Credit Union Consortium is managed in a highly responsible manner and receives guidance from one of Indiana's most respected actuarial firms. We believe it is the intention of the proposed rule to encourage more stable MEWAs in the future. However, the proposed rule works against this goal for existing and stable self-insured AHPs which are already subject to state oversight.

E. A Final Note on Grandfathering

We understand that the Department may consider grandfathering for existing AHPs that utilize experience rating. Grandfathering would potentially help the Credit Union Consortium. However, we have concerns that grandfathering alone would potentially hurt the formation of new AHPs. For example, assume that two separate employers wish to form an AHP. Employer A has 100 employees and pays $750,000 annually for health care coverage. Employer B also has 100 employees but pays $1,250,000 annually for health care coverage. If Employer A and Employer B create an AHP, but federal law prohibits experience rating, both employers would pay $1 million annually for coverage. **Except, however, this AHP will never form**. Although Employer B will be pleased to see its health care costs drop, Employer A will not enter into the AHP. A rational employer would not voluntarily agree to increase its health care expenditures by 33% simply to enter into an AHP.

We urge the Department to eliminate Proposed Regulation § 2510.3-5(d)(4) in its entirety. Thank you for your attention to this important issue.

Sincerely,



C. Randall Glassburn, President
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