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March 5, 2018

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue N.W.
Washington, DC 20210

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

To Whom It May Concern:

As the regulator of insurance for the State of New Mexico, I take my responsibility to New Mexico consumers very seriously, which is why I am deeply troubled by the proposed federal association health plan rule. Past administrations have touted these products as a cure-all for the woes of rising health insurance costs, only to see them fail at maintaining solvency and providing access to care. While the proposed rule pays lip service to this history, it does nothing to address the fundamental flaws of association health plans, which lack consumer protections and include illusory accountability structures, increased potential for adverse selection and discriminatory benefit design, and downright negligent levels of federal oversight capacity. Instead, the proposal engages in thinking that expansion of access to association health plans will be the silver bullet to solving the complex dilemma of rising health care costs and premiums.

As an alternative to allowing historical failures to repeat themselves, many states, including New Mexico, enacted guardrails to prevent abuses and insolvencies in association health plan products. In New Mexico, the legislature limited out-of-state association plan marketing, required association plans to register with the state and meet minimum solvency requirements, subjected plans to state receivership laws, and required adherence to consumer protection requirements under the state's Patient Protection Act.¹ The proposed federal regulation creates ambiguity about our state's ability to regulate association health plans via our laws regulating multiple employer welfare arrangements (MEWAs) and products that insure MEWAs. New Mexico's current laws offer important consumer protections that I believe are within our state's sovereign right to enforce.

Additionally, public policy in New Mexico has long held that associations must be "bona fide" to serve as conduits of health insurance benefits. The state promulgated law specifically to prevent fly-by-night groups from ever again promising health benefits, then disappearing with citizens' hard-

¹ Sections 59A-23-9, 59A-23C-3, 59A-15-20, 59A-41-2 N.M.S.A. 1978.

earned dollars.² New Mexico's definition of a "bona fide" association requires that such groups (a) have been in existence for five or more years; (b) have been formed and maintained in good faith for purposes other than obtaining insurance; (c) not condition membership on health status of employees or their dependents and make benefits available to all association members; and (d) not offer coverage to an individual without a connection to the association. Whereas our state policy once aligned with the federal government's view of associations, the proposed regulation dislodges this alignment. I fundamentally disagree with the proposed rule's rollback of parameters for participation in associations and believe it eliminates basic accountability measures that protect consumers.

Notably, fraud and abuse have not been the only woes caused by MEWAs. Even well-intentioned non-fully-insured MEWAs have been notoriously prone to insolvencies. Keeping the costs of coverage low tends to be the primary focus of MEWAs. In the past, MEWAs have become insolvent simply because the MEWA did not want to raise the premium rates for member employers and their employees. Solvency is also a challenge for MEWAs under the best of circumstances because they comprise by their very nature, an unstable risk pool. They do not have the consistency of membership of a true large employer. Association health plans' unstable risk pools and lack of consistency in membership will undermine any purported "savings" in aggregated administrative costs.

I am also profoundly concerned with the proposed regulation's relaxation of boundaries between an "employer" and an "insurer." The Department of Labor's proposed definition of employer eliminates the requirement that an association must exist for a reason other than offering health insurance. The proposed rule also unwinds long-standing requirements that an employer may only provide benefits through an association with an articulable connection to the employer's industry. With the elimination of these requirements, the difference between an employer's relationship to an association plan and a state-regulated health insurance plan becomes negligible. Conversely, however, the proposed rule increases discrepancies between the oversight and coverage mandates of these two types of plans. The damaging result, I believe, would be a proliferation of challenges for employers and their employees seeking to differentiate between coverage options. These challenges could lead to imprudent decisions that would drive employers to select plans with the lowest premiums without understanding the impact on access to care and the rights of their employees.

For the reasons above, I urge you to ensure that the final regulation affirms states' full authority under ERISA's savings clause to set MEWA-specific licensure requirements, benefit and rating standards, consumer protections, and solvency standards. Additionally, I ask that the final rule affirm states' authority under ERISA's savings clause to regulate the terms of any insurance that is offered to fully-insured MEWAs. I endorse the National Association of Insurance Commissioners' (NAIC) comments seeking coordination between the Department of Labor and state insurance commissioners around the implementation of this rule, especially regarding additional notice requirements for rights and responsibilities under association plan coverage. I also join the NAIC in urging against any move to grant an exception from state law for non-fully-insured MEWAs. The Department has not given

² Sections 59A-23E-2, 59A-23E-13, 59A-23E-14, N.M.S.A. 1978

reassurance that it has the capacity or resources necessary to carry out the regulatory functions long exercised by states. An exemption of non-fully-insured MEWAs from state law will likely result in the problems with fraud and insolvency described above.

I also agree with the NAIC's recommendation that the Department of Labor postpone the effective date of the rule to 2020 to give states time to review their rules and regulations and facilitate a smooth transition to any final outcome of the proposed rule. This extended deadline is especially important to states like New Mexico with irregular legislative session schedules.

If you would like to speak with me further about my comments, I welcome the opportunity.

Sincerely,

A handwritten signature in cursive script that reads "John G. Franchini".

John G. Franchini
Superintendent of Insurance