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Ms. Jennifer Cook
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National Association of Insurance Commissioners
701 Hall of the States
444 North Capitol Street, N.W.
Washington, D.C. 20001-1509

Subject: **NAIC ERISA (B) Working Group Draft Revisions to the NAIC ERISA Handbook**

Dear Ms Cook,

AHIP is pleased to offer these comments to the ERISA (B) Working Group ("the Working Group") on the draft language proposed for use in updating the NAIC's (*Health and Welfare Plans Under the Employee Retirement Income Security Act: Guidelines for State and Federal Regulation)* "ERISA Handbook". After reviewing the exposed drafts, we have comments and recommendations on only one of the draft exposures – the New Section on Association Coverage draft language ("the draft").

The draft acknowledges that it is possible for an association to sponsor a single group health plan and in that case the plan will be either a small group or large group plan based on the total number of employees of the employers that participate in the plan. While the plan will be a MEWA, it could nonetheless be a *single* ERISA plan at the association level and if it is a large group plan it will be subject to the ACA's rules that apply to large group plans rather than the ACA's rules that apply to small group plans.

However, the draft does not clearly set out the well-established DOL authority that sets forth the circumstances in which an association will sponsor a single group health plan: namely, if the employer members of the association share a certain level of commonality or purpose (such as participating in the same industry), and exercise control over the association benefit plan**.** DOL Adv. Op. 2008-07A (Sept. 26, 2008); DOL Adv. Op. 2007-06A (Aug. 16, 2007); DOL Adv. Op. 2001-04A (Marc. 22, 2001); DOL Adv. Op. 2003-13A.

Recommendation: To accurately reflect current law, we suggest revising Footnote 8 as follows:

8. According to Department of Labor ("DOL") authority, an association will sponsor a single group health plan if the employer members of the association share a certain level of commonality or purpose (such as participating in the same industry), and exercise control over the association benefit plan. See (1) MEWA Guide (www.dol.gov/ebsa/Publications/mewas.html); (2) Adv. Op 2008-07A (www.dol.gov/ebsa/regs/aos/ao2008-07a.html); (3) Adv. Op. 2001-04A (www.dol.gov/ebsa/regs/aos/ao2001-04a.html); (4) Adv. Op. 2003-13A (www.dol.gov/ebsa/regs/aos/ao2003-13a.html); and (5) Adv. Op. 2007-06A (https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/advisory-opinions/2007-06a).

The draft also incorrectly suggests that when an association, consistent with the DOL authority, does in fact sponsor a single large group health plan, the application of Public Health Service Act ("PHSA") 2705 (i.e. the HIPAA nondiscrimination rules) could preclude the association from treating each employer member as a separate risk pool. Specifically, page 3 of the draft states:

> "As a result of this guidance, states have taken different approaches to determining whether or not an association is acting as the employer and therefore can be considered a single large group health plan. If such a determination is made, it would appear to follow that the association as a single employer would have to be rated in the same manner as a single large employer plan, without discriminating between employees or groups of employees within the plan based on health status or claims experience.[9] Thus, just as a large employer's plan must be rated as a single risk pool rather than developing a separate experience rating for each office within the worksite, an association that is deemed to be a single employer should not be permitted to treat each employer member as a separate risk pool. The law remains unsettled on this point."

Importantly, the draft acknowledges that "the law remains unsettled on this point." But the draft does not actually reflect and apply the HIPAA regulations. In this regard, the statute and regulations permit a group health plan or insurer to make distinctions between "similarly situated individuals" enrolled in the plan. It is relevant here that a plan or insurer is permitted to charge different premiums to different groups of "similarly situated individuals." 29 CFR § 2590.702(b)-(d). A plan or issuer may treat participants as two or more distinct groups of "similarly situated individuals" if the distinction is based on a "bona fide employment-based classification consistent with the employer's usual business practices." 29 CFR § 2590.702(d)(1). Under the regulations, whether a classification is "bona fide" is based on all relevant facts and circumstances, including whether the employer uses this classification for other purposes that are independent of the qualification for health coverage. Examples provided in the regulations of classifications that may be bona fide include full-time versus part-time status, different geographic locations, date of hire, length of service, and different occupations.

If the health insurance coverage provided by associations to their members is a single ERISA group health plan, all employees of the association's members would be part of the same group health plan. In that case, a group health plan or insurer could distinguish among different employers participating in the plan so long as they constitute a group of "similarly situated individuals" distinguished based on a bona fide employment-based classification consistent with the regulation.

Recommendation: Given the above, we suggest the following paragraph to replace the first full paragraph on page 3 of the draft:

If the association sponsors a single group health plan, the plan or insurer may be able to treat each employer or groups of employers as a separate risk pool based on the facts and circumstances. Under DOL regulations, a group health plan or insurer may restrict benefits and/or charge different premiums for different groups of "similarly situated individuals" enrolled in the plan[9]. A plan or issuer may treat participants as two or more distinct groups of "similarly situated individuals" if the distinction is based on a "bona fide employment-based classification consistent with the employer's usual business practices."[10] Whether a classification is "bona fide" is based on all relevant facts and circumstances, including whether the employer uses this classification for other purposes that are independent of the qualification for health coverage.[11] Examples of nondiscriminatory methods of determining similarly situated individuals include different geographic locations and different occupations.

9. 29 CFR § 2590.702(b)-(d).
10. 29 CFR § 2590.702(d)(1).
11. Id.

[The remaining footnotes of that draft section would be renumbered accordingly.]

Thank you for the opportunity to present these comments. We look forward to the discussion on the Working Group's call on October 11. If there are any questions regarding these comments, I can be reached at 202-778-8487, or at cgallaher@ahip.org. Thank you.

Sincerely,

Candy Gallaher, Senior Vice President
AHIP State Policy