

June 21, 2023

The Honorable Kevin McCarthy  
Speaker  
U.S. House of Representatives  
Washington, DC 20515

The Honorable Hakeem Jeffries  
Minority Leader  
U.S. House of Representatives  
Washington, DC 20515

The Honorable Virginia Foxx  
Chairwoman  
Committee on Education & the Workforce  
U.S. House of Representatives  
Washington, DC 20515

The Honorable Robert C. Scott  
Ranking Member  
Committee on Education & the Workforce  
U.S. House of Representatives  
Washington, DC 20515

Dear Speaker McCarthy, Leader Jeffries, Chairwoman Foxx, and Ranking Member Scott:

On behalf of NAIC's members—the chief insurance regulators in 50 states, the District of Columbia, and U.S. territories—we write to express our objections to provisions in HR 3799, the CHOICE Arrangement Act, which would preempt state authority to regulate their small group health insurance markets.

We commend Congressional attention to the health coverage needs of small businesses and the rising costs facing employers and their employees. However, certain language in the association health plans (AHP) and self-insurance sections of the bill would preempt state laws and regulations and limit the ability of state regulators to stabilize their markets and protect consumers.

In 2018, the Department of Labor adopted a revised definition of "employer" under ERISA, creating a new pathway for the formation of AHPs. While state insurance regulators highlighted a number of considerations for the Department in the rulemaking process, we were satisfied that DOL clarified with the final rule that AHPs remained multiple employer welfare arrangements (MEWAs) subject to state regulation.

HR 3799 threatens to upend the longstanding authority of states to protect consumers and markets. The bill requires treatment of certain AHPs as "single employer plans." This would deprive states of jurisdiction over those plans because ERISA preempts all state regulation of single-employer plans while preserving concurrent state jurisdiction over "multiple employer welfare arrangements" that provide coverage for two or more employers. It is especially troubling that the bill would thereby preempt state authority over self-insured arrangements, which are the riskiest type of MEWAs.

We urge Congress to maintain a continuing role for state insurance regulators in protecting small businesses, their workers, and broader insurance markets by keeping AHPs under state supervision. The Trump administration's AHP rule did not take the step of removing state authority and neither should legislation in this Congress.

Other provisions of the legislation also cause concerns. First, the bill would allow individuals to act as small businesses when they have any ownership stake in a firm or partnership. As NAIC argued in its amicus brief<sup>1</sup> in *Data Marketing Partnership v. DOL*, a scheme that labels individuals as "limited partners" without giving them true ownership or equity in a business does not make them working owners or bona fide partners. The legislation would establish only minimal standards for self-employment with no effective monitoring and enforcement mechanism. We suggest that the legislation limit participation to individuals who can substantiate the claimed income or work hours through tax filings as self-employed individuals or members of partnerships under the Internal Revenue Code (IRC). Using the IRC definition would ensure that self-employed individuals who join an AHP are genuinely engaged in a trade or business and are performing services for the trade or business in a manner that is in the nature of an employment relationship.

Second, the legislation would allow an AHP to charge its employer members different premiums based on their risk profiles. This practice could lead to risk selection against a state's small group insurance market. Employers with a more favorable risk profile would be incentivized to participate in an AHP, while those with less favorable risk would not. The employers with less favorable risk would be more likely to purchase coverage in their state's small group market, where insurers would need to charge higher rates. States could mitigate these effects with their own rating rules only if they retain authority over the rating practices of AHPs.

The self-insurance provisions of HR 3799 would similarly limit states' valid authority over insurance, encourage risk selection, and put workers at risk. Like some AHPs, some so-called level-funded plans for small businesses seek to exploit ERISA's preemption of state insurance laws to offer lower costs to some while raising costs for those who purchase insurance in the small group market.

An employer self-insures when it pays directly for its employees' health care expenses, rather than transferring risk to an insurer. A stop loss insurance plan allows an employer to manage its risk of *unexpected, excessive* health care expenses when it self-insures. However, some stop loss policies are structured to cover health expenses that can and should be reasonably expected. Several states have chosen to regulate stop loss policies to ensure they do not serve as unregulated health insurance. Some have adopted NAIC's Stop Loss Insurance model act, while others have taken a different approach, showing

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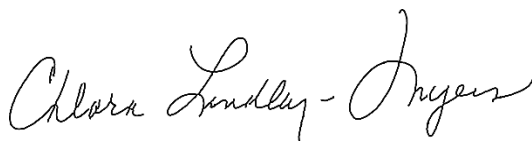
<sup>1</sup> Available at <https://content.naic.org/sites/default/files/inline-files/2021-04-07%20NAIC%20Amicus%20Curiae%20Brief.pdf>

states have weighed their own needs, preferences, and considerations in this area. The current regulatory framework around stop loss insurance is effective and should not be disrupted through federal legislation

As passed by the Committee, HR 3799, however, would threaten states' authority to enforce such regulations. It would allow federal law to overrule a state's determination of when health care costs are expected versus unexpected. The legislation is not specific as to which state laws would be preempted, creating uncertainty and leaving the decision in the hands of judges. We urge Congress to strike the section of the bill that preempts state insurance authority.

While the bill's proponents are hopeful that this legislation will result in reduced costs for some small employers, any lower cost coverage will be in riskier, more loosely regulated plans and shift costs onto those who remain in traditional small group markets. We encourage you to amend the bill to preserve state regulation and ensure markets remain stable and consumers are protected. And we offer our experience and expertise to find solutions that will lower health care spending and, therefore, costs for all small businesses.

Sincerely,



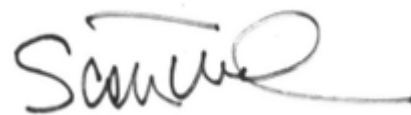
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