To: Bob Wake, Chair, ERISA Working Group

Jennifer Cook, Senior Health and Life Policy Counsel

National Association of Insurance Commissioners

From: NAIC Consumer Representatives

Date: October 26, 2018

On behalf of the NAIC consumer representatives signed below, we appreciate the opportunity to comment on the draft of the ERISA Handbook, dated October 11, 2018, which incorporates updates for the final federal rule on Association Health Plans issued on June 21, 2018.

We believe the revisions to the Handbook adequately address the areas we identified as critical elements to be included in a discussion of the final rule, specifically:

* The final rule provides an additional way for an association of employers to be determined to be an “employer” under ERISA. New AHPs can therefore form and offer coverage under either the prior guidance or under the new rule.
* AHPs formed and operated under the new regulatory pathway are prohibited from discriminating in eligibility, benefits or premiums based on a health factor either within or across employer groups that obtain coverage through the AHP.
* The final rule reaffirms the authority of states to regulate both fully insured or self-insured MEWAs.

We also believe the final, adopted Handbook should retain discussion of the extensive history of AHP fraud and insolvencies that left consumers and providers with unpaid claims. We are concerned that the more flexible, newly authorized path, which makes it easier to meet the test for “employer,” will invite greater fraud and insolvencies. Further, while the new rule prohibits basing eligibility, benefits or premiums on health status, we remain concerned that AHPs operating under the final federal rule retain the flexibility to rate on other factors that can be used as a proxy for health status, such as age, gender and industry and can design benefits to avoid higher cost employers and individuals.

We also reviewed the discussion of Wellness Programs on p. 103 of the current draft and recommend the edits noted below:

1. *Wellness Programs – (29 CFR §§ 2590.702 and 29 CFR 2590.715-2705)*

Wellness programs are programs of health promotion or disease prevention. Employers may provide a wide range of wellness programs, but the regulations generally prohibit discrimination based on health factors, with exceptions for benign discrimination (*e.g.,* making benefits specifically available to persons with designated health conditions) and participation incentives. “Health contingent” incentives (incentives that depend on health outcomes or on participation in specified activities such as exercise) are subject to financial limits and must provide an opportunity to earn the incentive through reasonable alternatives or to waive the standard for ~~that give~~ participants with medical limitations or, in some cases, other limitations ~~an opportunity to earn the incentive~~. Wellness programs are also regulated by the EEOC under the Americans with Disabilities Act (ADA) and GINA. A recent court decision has remanded the EEOC’s regulations and directed the agency to reconsider whether the ADA and GINA further limit the range of wellness program penalties otherwise permitted under the PHS Act if employees refuse to provide health information on themselves or their spouses.[[1]](#footnote-1)

With these changes, we urge the Working Group to swiftly approve the Handbook and move to adopt a final version that can be shared with states and other interested parties. As noted on the Working Group’s last call, we can expect continued changes to federal rules affecting ERISA-governed plans, including the proposed rule on Health Reimbursement Arrangements released this week and open for comment until the end of the year. However, despite comments from the NAIC and many state regulators asking for federal regulators to delay implementation of the final rule on AHPs until 2020, some types of AHPs have been able to form and operate under the new, more flexible guidance since September 1st. We therefore urge the Working Group to finalize the Handbook as quickly as possible and revisit the Handbook, as needed, to reflect final changes to federal rules in the future.

Thank you for your consideration. If you have any questions, please contact JoAnn Volk at 202-687-3944 or [joann.volk@georgetown.edu](mailto:joann.volk@georgetown.edu).

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1. *AARP v. EEOC,* No. 16-2113 (D.D.C. August 22, 2017), 2017 U.S. Dist. LEXIS 133650. [↑](#footnote-ref-1)