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### MISSISSIPPI INSURANCE DEPARTMENT BULLETIN 2018-8

**TO: ALL ISSUERS OF HEALTH INSURANCE PRODUCTS IN MISSISSIPPI**

**FROM: MIKE CHANEY  
COMMISSIONER OF INSURANCE**

**DATE: December 20, 2018**

**SUBJECT: ASSOCIATION HEALTH PLANS**

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#### **I. Purpose**

The purpose of this Bulletin is to advise all carriers and producers of the Mississippi Insurance Department's ("MID") position on pre-Final Rule federal regulations, the provisions of the new Final Rule, and the interaction between the pre-Final Rule regulations, the Final Rule, and Mississippi law.

#### **II. Background**

On June 19, 2018, the Department of Labor ("DOL") issued its final rule (the "Final Rule") expanding the availability of association health plans ("AHPs") in response to an Executive Order issued by President Trump in October 2017. Under existing DOL guidance prior to issuance of the Final Rule, multiple employers may be treated as a single "employer" under the Employee Retirement Income Security Act of 1974 ("ERISA") if they are members of a "bona fide group or association of employers." Under pre-Final Rule guidance, the DOL had narrowly defined "bona fide group or association of employers" to require any such group or association to meet a "Commonality of Interest" test. To satisfy this test prior to the Final Rule, all group or association members were required to be in the same trade or industry, and be located in the same geographic region.

The Final Rule expands the Commonality of Interest test, providing that the association members will satisfy the test so long as they are: (1) in the same "trade, industry, line of business or

profession,” *regardless of location*, or (2) are located in the “same state or metropolitan area even if the metropolitan area includes more than one state.” Under the Final Rule, the determination as to what constitutes a “trade, industry, line of business or profession” for purposes of the test will be based on “all relevant facts and circumstances.”

In addition to satisfying the Commonality of Interest test, under the Final Rule an AHP must also have at least one substantial business purpose unrelated to providing health coverage. In other words, the members cannot have affiliated purely for the purpose of obtaining a large group health plan. As the comments to the Final Rule clarify, a substantial business purpose exists if the association would be a viable entity in the absence of sponsoring an employee benefit plan. All AHPs must comply with applicable HIPAA requirements. However, Final Rule AHPs must comply with more restrictive non-discrimination rules set forth in the regulation that are not applicable to pre-Final Rule AHPs. And in a further departure from the pre-Final Rule model, the Final Rule allows working owners and sole proprietors to qualify as “employers” who may participate in an AHP, so long as they meet minimum working hour and income requirements.

The Final Rule clarifies that all AHPs are a form of MEWA (Multiple Employer Welfare Association). Nothing in the Final Rule changes the ability of states to regulate MEWAs or AHPs at the state level and to extend benefit mandates to self-insured AHPs. States continue to share enforcement with the DOL.

Also under the Final Rule, AHPs are prohibited from rating based on individual employer or employee health factors. AHPs are allowed, however, to rate based on type of employer, geographic region, gender, age or industry. This is another change from the pre-Final Rule guidance which recognized the “Look Through Doctrine” and permitted rating at the employer level instead of just the association or group level. This is an important distinction because the Final Rule *does not supersede pre-Final Rule guidance*; instead, the Final Rule sets forth a second accepted structure for AHPs. AHPs formed under pre-Final Rule guidance may continue to exist under that guidance, and new AHPs may form under either the pre-Final Rule guidance or the Final Rule guidance. AHPs may not, however, form under a hybrid combination of pre-Final Rule and Final Rule guidance.

### **III. Interpretation and Enforcement**

#### **1. Fully-Insured MEWAs/Association Health Plans.**

Fully-insured MEWAs and AHPs, whether established under pre-Final Rule or Final Rule guidance, are not required to obtain certificates of authority. Fully-insured MEWAs and AHPs are primarily regulated through MID’s regulation of the carrier that issues the contract of insurance to the MEWA or AHP. Carriers submitting AHPs must comply with all federal and Mississippi requirements for the submission of group health insurance plans.

##### **A. Pre-Final Rule fully-insured MEWAs and AHPs.**

Pre-Final Rule fully-insured MEWAs and AHPs will continue to be regulated as they were before the effective date of the Final Rule. Consistent with Federal regulations, to

be a pre-Final Rule fully-insured AHP there must be (i) a “bona fide” group or association of employers acting in the interest of its employer-members to provide benefits for its employees (i.e., there must be “commonality of interest”) and (ii) the association members must themselves exercise “control,” both in form and substance, over the activities and operations of the plan. To be a bona fide group or association of employers, under pre-Final Rule guidance, the association must be comprised of employers in the same industry and the same region. Whether a pre-Final Rule AHP is properly formed will be determined based on federal guidance. MID may request information regarding the proper formation of any pre-Final Rule MEWA and AHP.

**B. Final Rule fully insured AHPs.**

Final-Rule regulations and guidance does not change how MID will regulate AHPs and, although it has the authority to impose stricter requirements on Final Rule AHPs, generally speaking MID will follow the Final Rule guidance published by the United States Department of Labor.

Pursuant to the newly issued Federal guidance and in accordance with the Final Rule, MID will allow carriers of properly formed, fully-insured AHPs to be rated as a single large group employer (as opposed to being rated as a small employer). Furthermore, Final Rule AHPs in Mississippi may be formed around the same “common trade, industry, line of business, or profession” as defined in the Final Rule and its comments, and as may be established in future Federal guidance. MID retains authority to regulate AHPs at the time of formation to ensure the test as set forth in the Final Rule guidance is satisfied and may request information regarding the proper formation of Final Rule AHPs. Unless and until additional regulations are released which prohibit it, Final Rule AHPs may be composed of multiple small and large employer groups.

Final Rule AHP members must have at least one of the following in common:

- (a) Trade, industry, line of business or profession;
- (b) Principal place of business in the same state, city or county; or
- (c) Principal place of business in the same metropolitan area (possibly including more than one state).

The Final Rule AHP must have at least one substantial business purpose other than to provide health care benefits to its members, and the AHP must be fully governed by its members. A substantial business purpose is considered to exist if the entity would be a viable association even in the absence of sponsoring a health plan. Under certain circumstances as set forth in Federal guidance, working owners may be considered employers and allowed to join an AHP as an employer member, although AHPs are not required to allow working owners to join them. All AHPs are advised to maintain records necessary to demonstrate that they are in compliance with Final Rule requirements.

2. Self- Insured Association Health Plans.

MID has historically treated self-insured MEWAs and AHPs as entities that do the business of insurance, and therefore has required such self-insured MEWAs and AHPs to be licensed as insurance carriers. Through this Bulletin, MID affirms its position that self-insured MEWAs and AHPs must be licensed as insurance carriers. It is MID's position that unlicensed entities, such as self-insured MEWAs and AHPs must be licensed for the protection of consumers. Any self-insured MEWA or AHP doing an insurance business without authority or license to do so shall be considered an illegal operation. Note that MID considers self-insured and self-funded to be one and the same and the designation of one term and not the other does not change MID's position as herein stated.

Please direct any questions to the Life and Health Actuarial Division at 601-359-2012.

Issued the 20th day of December, 2018

  
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MIKE CHANEY  
COMMISSIONER OF INSURANCE