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September 27, 2018

Michael Pieciak, Commissioner
Department of Financial Regulation
89 Main Street
Montpelier, VT 05620

Re: Association Health Plans

Dear Commissioner Pieciak:

As a preliminary comment to the Department of Financial Regulation's (DFR) proposed rule on fully insured association health plans (Emergency Regulation I-2018-01-E), MVP Health Care ("MVP") asks DFR to adopt the New York State so-called "look through" provisions, NY Ins. Law 4317(d) <http://public.leginfo.state.ny.us/lawssrch.cgi?NVLWO>. See also New York Insurance Circulator Letter No. 10 (2018) Regulation of Association Health Plans https://www.dfs.ny.gov/insurance/circltr/2018/cl2018_10.htm.

As DFR is well aware, on June 19, 2018, the United States Department of Labor (DOL) issued a regulation that is intended to make it easier for unrelated employers and business owners to band together as if they were a single employer, and purchase health insurance through an association health plan (AHP). Like DFR, MVP is concerned that this could have a harmful effect on the community rated Exchange market in Vermont, similar to what occurred prior to 2014. In that spirit, we fully supported Act 131 of the 2018 legislative session.

The New York look through provisions require that coverage issued to a fully insured AHP must be rated based on the size of each underlying member employers, and not based on the entire association group size. Large employer members must be issued large group coverage for rating purposes, small employer members must be issued small group coverage for rating purposes, and individual members/sole proprietors must be issued individual coverage for rating purposes.

New York requires pure community rating of individual and small group market products, but permits experience rating of fully insured large groups. As a result, the look-through requirements prevent adverse selection that would otherwise occur if individuals and small groups joined an AHP to obtain experience-rated large group coverage, and opted out of the state's community rated markets. And, similar to DFR's emergency regulation provision, coverage issued to an association that includes one or more small groups or individuals must provide coverage for essential health benefits for all of the association members.

Like DFR, the New York Superintendent of Financial Services has determined that federal law and interpretation does not pre-empt, in whole or in part, New York law or its regulation of health insurance. Notably, this assertion is supported on p. 94 of the new federal rules, where the DOL declines to respond to requests for a federal opinion or determination that state group size and/or rating rules are preempted, noting that courts have generally upheld such state laws under ERISA. Therefore, New York has clarified that these state "look through" provisions are in full force and effect.

For additional background, New York updated its insurance market laws before 2014 to comply with the Affordable Care Act (ACA), and to establish a state-based health exchange. Before these changes took effect, New York allowed sole proprietors to opt out of the individual market, and to purchase small group coverage through associations and chambers of commerce. At the time, small group premiums were significantly cheaper than those available on the individual "direct pay" market.

As a result, sole proprietors opted out of the individual market, helping to reduce statewide individual market enrollment to roughly 20,000 people by 2013, and increase premiums to well over \$1,000 per month for individuals. For comparison, New York's individual market currently includes more than 250,000 enrollees in Qualified Health Plans (QHPs), and several hundred thousand more enrollees in the state's Basic Health Program (enrollees between 138 and 200% of the Federal Poverty Level). QHP premiums today are, on average, 55 percent lower after adjusting for inflation and before application of federal premium tax credits than they were in 2013.

In closing, we've seen firsthand how adverse selection drives consumer behavior to the detriment of fully insured health insurance markets. New York's look-through rule has helped to revitalize the state's community rated markets, and is helping to preserve the integrity of those markets for all enrollees. We urge DFR to adopt a similar look-through rule to help protect the Vermont Exchange market.

Thank you for your consideration of this request, and we are available if you would like to discuss this or have any questions. Please contact Susan Gretkowski to arrange any follow up (sgretkowski@mvphealthcare.com).

Sincerely,



Karla Austen
Executive Vice President and Chief Financial Officer

Cc: Emily Brown, DFR
Susan Gretkowski, MVP
Steve Imbriaco, MVP
Kelly Smith, MVP

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Insurance Circular Letter No. 10 (2018)

July 27, 2018

TO: All Insurers Authorized to Write Accident and Health Insurance in New York State, Article 43 Corporations, Health Maintenance Organizations and all Agents and Brokers Licensed to Sell Accident and Health Insurance in New York State**RE: Regulation of Association Health Plans****STATUTORY REFERENCES: N.Y. Insurance Law §§ 1101, 1102, 2110, 2117, 2122, 2127, 2403, 2406, 3201, 3231, 4317 and 4235****I. Purpose**

This circular letter is issued to remind insurers authorized to write accident and health insurance in this State, Article 43 corporations, and health maintenance organizations (collectively, "issuers"), and insurance agents and brokers that New York requirements for accident and health insurance coverage obtained through associations are not preempted by federal law. The recent U.S. Department of Labor ("DOL") final rule ("AHP Rule") expressly does not preempt the New York Insurance law which strictly limits the associations or groups of employers that may sponsor a health insurance plan. The Department of Financial Services ("DFS") will take action against an issuer, agent or broker for any failure to comply with or attempt to circumvent New York statutory or regulatory requirements with respect to accident and health insurance coverage, employee welfare benefit plans or association health plans, including New York's requirements regarding the establishment of such groups, the provision of essential health benefits and other consumer protections.

II. Discussion

On June 21, 2018, the DOL issued the AHP Rule to permit a group or association of employers to establish a group health plan that is an employer welfare benefit plan (an association health plan or "AHP") for the benefit of its members. *See* 83 FR 28912. The AHP Rule clearly states that these groups and associations of employers are a type of multiple employer welfare arrangement ("MEWA") under the Employee Retirement Income Security Act ("ERISA") and that the AHP Rule has no impact on, and does not preempt in any way, state regulation of MEWAs pursuant to ERISA § 514. As a result, AHPs are subject to the same statutory and regulatory requirements as any other MEWA in New York.¹

A. Fully-Insured Coverage Issued to Associations

Regardless of the AHP Rule, for a group or association of employers to sponsor a group health plan in New York, the group or association must meet specific requirements to be recognized as a group under the Insurance Law. For example, Insurance Law § 4235(c)(1)(H) and (K) require that an association be in active existence for at least two years and be formed principally for purposes other than obtaining insurance coverage for its members. An association formed for the purpose of obtaining health insurance coverage is not a recognized group in New York and therefore is not permitted to purchase health insurance coverage in New York. Accordingly, issuers may not deliver or issue for delivery health insurance policies or contracts in New York to an association that does not satisfy the New York Insurance Law requirements, nor may brokers or agents solicit or procure such a policy in this State.

In the event an association is a recognized group under the Insurance Law, every health insurance policy delivered or issued for delivery in this State to the association must meet the requirements of the Insurance Law, including those pertaining to rating and benefits. For instance, Insurance Law §§ 3231(g) and 4317(d) require that coverage issued to an association be rated based on its underlying member employers, and not based on the size of the association group. Large employer members must be issued large group coverage, small employer members must be issued small group coverage, and individual members must be issued individual coverage. This requirement is often referred to as the "look through" provision, which precludes individuals and small groups from combining for purposes of obtaining large group coverage. Importantly, under Insurance Law §§ 3221(h) and 4303(II), coverage issued to an association that includes one or more individual or small employer members must provide coverage for essential health benefits for all of the association's members.

B. Self-Funded Associations

The AHP Rule also does not modify the existing ERISA regulatory framework that allows states to regulate self-funded associations. An association that self-funds health insurance benefits for the New York employees of its members would be doing an insurance business in New York as defined in Insurance Law § 1101. Entities doing the business of insurance in New York are subject to the Insurance Law under Insurance Law §§ 1101 and 1102, as well as other provisions of the law. New York Insurance Law requires that any self-funded association doing an insurance business in New York must be licensed to do an insurance business in this State regardless of where that self-funded



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October 12, 2018

Via Email and First Class Mail

Michael Pieciak, Commissioner
Vermont Department of Financial Regulation
89 Main Street
Montpelier, VT 05620

Re: Association Health Plans

Dear Commissioner Pieciak:

Thank you again for visiting MVP Health Care's headquarters in Schenectady earlier this week. We value our relationships with you and the Vermont Department of Financial Regulation as we continue our mission to provide quality health insurance options to Vermont's citizens and businesses. This letter is intended to serve not only as a follow-up to our conversation, but also as additional MVP comments in response to Proposed Rule I-2018-01. (MVP previously supplied comments in a letter to you dated September 27, 2018.)

Look-through Rating

One of the subjects we discussed during your visit was whether existing Vermont statutes and/or regulations give the VT DFR the authority to impose rating requirements on Vermont association health plans (AHPs) similar to New York's "look-through" rating rules. These rules require each employer insured through an association to be rated according to the employer's size, thereby prohibiting the aggregation of all an association's member employer into one large group for rating purposes.

Vermont's existing community rating regulation (CVR 21-040-014) applies to small group carriers providing small group health plans to small groups, and it explicitly states that "Multiple Employer Welfare Associations and other associations that are made up of a collection of small groups are included." Although some aspects of the regulation are arguably unclear, the specific inclusion of associations and the lack of any wording that would directly prohibit the DFR from applying look-through rating rules to small groups that purchase coverage through an association suggest that the DFR can do just that. In addition, 8 V.S.A. § 4079a directs the Commissioner to adopt rules regulating AHPs "in order to protect Vermont consumers and promote the stability of Vermont's health insurance markets." This statute, which was enacted earlier this year and predates the issuance of the federal AHP regulations, also may provide the DFR the authority to go beyond the rating requirements included in Vermont's proposed rule and require look-through rating of association employer members.

By permitting insurers to use large group rating methodologies and underwriting discretion that could be manipulated to produce artificially lower rates for association health plans than the rates currently applicable to individual and small group policies sold through Vermont Health Connect (VHC), the DFR's current proposed AHP regulation has the real potential to cause an exodus of VHC enrollees and increased premiums for those purchasing through VHC going forward. Therefore, because of the likelihood that the DFR's proposed AHP regulation will not only destabilize Vermont's individual and small group markets but also harm Vermont consumers, MVP encourages the DFR to exercise its authority to amend the proposed regulations by including look-through rating.

Insurer Exclusivity and Broker Concerns

The DFR's proposed AHP regulations are structured in a way that contemplate an association partnering with an insurer (and to some extent, a broker) for purposes of the association's license application to the DFR. Although DFR staff have articulated that this is intended in part to provide the DFR with a full and transparent view of the association health plans offered in Vermont, it has become clear that this structure will have unintended consequences. For example, it is MVP's understanding that there is some arrangement between the two associations that have applied to offer AHPs in 2019, their broker and BlueCross BlueShield of Vermont (BCBSVT) to exclusively offer BCBSVT coverage to the associations' employer members. Because only associations already in existence for at least one year are eligible to offer AHPs in 2019, MVP is concerned that these exclusivity arrangements effectively have created a monopoly for BCBSVT and MVP has been excluded from the market in 2019.

When combined with a broker's ability to be paid commission on association health plan sales and inability to be paid commission on VHC sales, the regulation's requirement of a joint insurer/association license application creates an incentive for brokers to negotiate such exclusive arrangements that benefit the broker and insurer but that may not be in the best interest of the employers and employees insured through an association. Proposed bonus payments for brokers that bring new business to BCBSVT are further evidence of this incentive. The notices that the regulations require to be included in AHP policies may be seen too late to alert employers and employees of other options they might have. Similarly, the broker disclosures required by Section 16 of the regulations may not prevent improper steering of association business.

Considering the relatively small number of associations that can be expected to offer AHPs, the proposed regulations can be amended in ways that still would give the DFR the transparency into the AHP market it wants while not attaching an association to a particular insurer in the licensing process. Specifically, insurers could be permitted to file an association health plan for DFR approval with enough flexibility to accommodate various potential association health insurance offerings instead of a plan for one particular association, and the regulation's current reporting requirements would still serve to identify the insurers that each AHP is working with.

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Michael Pieciak, Commissioner

October 12, 2018

If the DFR is not willing or able to separate insurers from associations in terms of an association's licensure, however, there are a number of provisions already in the proposed regulations that the DFR can use to ensure that association employer members have their choice of coverage that is best for their employees. Section 4.A.9 requires an association to identify any broker with whom the association has partnered and Section 4.A.11 calls for copies of current contracts between an association and an insurer to provide coverage. Section 4.A.12 requires the filing of an association's advertising materials with DFR. Section 14 allows the DFR to examine the business affairs of an association. Together with DFR's broad discretion, these provisions should give DFR enough information to conclude whether Vermont's consumers are being protected sufficiently when purchasing through an association and to ensure that improper incentives are not influencing AHP offerings.

Conclusion

With the benefit of more time, the DFR can craft AHP regulations that better protect Vermont's employers and employees and prevent improper broker influence while still tightly regulating AHP coverage. Therefore, MVP encourages the DFR to consider the information above and to delay the approval of any 2019 AHP approvals until the proposed regulations are amended and finalized.

Thank you for your consideration. MVP is available to discuss further and assist, so please contact Susan Gretkowski to arrange as needed.

Sincerely,

A handwritten signature in black ink, appearing to read "Monice Barbero". The signature is fluid and cursive, with a large initial "M" and a long, sweeping tail.

Monice Barbero

Executive Vice President

General Counsel

Government Affairs & Compliance