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April 16, 2019

To: Commissioner Michael S. Pieciak
Vermont Department of Financial Regulation
89 Main Street, Montpelier VT 05602-3101

CC: Kevin Mullin, Chair, Green Mountain Care Board; Rebecca Heintz, General Counsel, Blue Cross Blue Shield of Vermont

Re: Status of fully-insured and self-insured association health plans formed under the Department of Labor's 2018 rule interpreting the definition of "employer" under section 3(5) of ERISA

Dear Commissioner Pieciak,

The Office of the Health Care Advocate (HCA) writes to draw the Department of Financial Regulation's (DFR) attention to a federal court decision that invalidates key provisions of the Department of Labor (DOL) rule on association health plans (AHPs).¹ AHPs formed under the invalidated DOL rule now violate federal law.

On March 28, 2019, a federal district court (Court) held that the DOL rule's provisions related to "bona fide" associations and working owners were unlawful and vacated them. New York v. United States Department of Labor, 18-1747 (JDB), 2019 WL 1410370 (D. D.C. 2019). This vacation has nationwide effect. See e.g., Harmon v. Thornburgh, 878 F.2D 484, n. 21 (D,C, Cir. 1989).

The above-referenced federal court ruling has immediate implications for AHPs that sell and provide health insurance to Vermonters. Below we highlight two results of the court ruling on Vermont AHPs.

First, fully-insured and self-insured AHPs formed under the vacated provisions of the DOL rule must cease marketing and selling health insurance to new enrollees and sole proprietors. AHPs formed under the now vacated provisions of the DOL rule are currently out of compliance with the ACA and are thus illegal. Despite their illegality, we continue to hear of associations marketing AHP products to Vermonters.

¹ DOL issued a rule that made it easier for a group of employers to form an AHP under the Employee Retirement Income Security Act of 1974 (ERISA) in June of 2018. Definition of "Employer" Under Section 3(5) of ERISA Association Health Plans, 24 C.F.R § 2510 (2018). The rule, among other things, relaxed the definition of "bona fide" associations and working owners functionally allowing a greater number of businesses to obtain health insurance that is not subject to rating and other requirements mandated by the Patient Protection and Affordable Care Act (ACA). Presumably in response to the DOL rule expanding the types of permitted AHPs, DFR issued rules detailing the conditions and requirements of fully-insured and self-insured AHPs that offer health insurance to Vermonters. Vt. Dept. Fin. Reg., Fully-Insured MEWA and AHP Plans, 1-2018-01 (2018); Vt. Dept. Fin. Reg., Self-Insured MEWA and AHP Plans, 1-2018-02-E (2018).

Second, the Court's invalidation of certain provisions of the DOL rule raises substantial questions related to how DFR should handle existing fully-insured and self-insured AHPs formed under the vacated provisions of the DOL rule. Plans formed under the vacated provisions of the DOL rule no longer qualify as ERISA plans and these plans are now governed by the ACA. Under the ACA, experience rating a sole proprietor or small group product outside of the individual and small group risk pool is illegal. Regardless of this fact, Vermont AHPs currently experience rate sole proprietor and small group products outside of the individual and small group risk pool and there is some evidence that Vermont AHPs may continue this practice. See e.g., GMCB-004-19rr, Blue Cross and Blue Shield of Vermont Actuarial Memorandum.

We respectfully request that DFR prohibit the marketing and selling of illegal AHP products to Vermonters. Further, we request that DFR exercise its regulatory authority to enforce this prohibition. We also ask DFR to promptly develop a plan to bring such illegal plans into compliance with federal law. DFR's plan should seek to not unduly harm Vermont businesses who purchased health insurance that was permitted under the now vacated DOL rule while simultaneously reflecting the urgent need for health insurance activities in Vermont to comply with federal law.

Lastly, we acknowledge the current uncertainty regarding how DOL will react to the Court's decision. However, unless and until the Court's decision is overturned or stayed, Vermont AHPs formed under the vacated provisions of the DOL rule are illegal. DFR must not allow illegal AHPs to exist in Vermont or for these entities to market and sell illegal products to Vermonters. We appreciate your timely attention to this matter.

Sincerely,

s\ Mike Fisher

Chief Health Care Advocate, Office of the Health Care Advocate