SMALL BUSINESS HEALTH PLANS
ASSOCIATION HEALTH PLANS BY ANOTHER NAME:
Preempting State Regulation, Hidden Costs for Consumers and Businesses

Summary: The Senate's Affordable Care Act (ACA) repeal bill (Senate Bill) contains many problematic provisions. Among these is a hidden provision that would preempt New York's consumer protections and wreak havoc upon the small group market covering over a million New Yorkers. This bill would allow so-called "small business health plans," more commonly called Association Health Plans (AHP), to form and operate outside DFS regulatory authority and beyond the reach of longstanding state consumer protections and solvency laws. The Senate Bill would remove the authority of state governors, legislators, and insurance regulators to set rules and oversee AHPs, by federal preemption of state consumer and provider protection laws. The Senate Bill would result in huge costs for consumers and businesses, as well as providers, brokers and regional insurers, as AHPs would have free reign to "cherry pick" healthy individuals and businesses, causing rates to spike for everyone else. This Bill would also harm local insurers, undermining competition as large, national insurers take advantage of AHPs to cherry pick healthy lives. The National Association of Insurance Commissioners (NAIC) and national organizations for actuaries and brokers have all opposed similar bills, as have New York consumer, doctor and hospital associations.

Discussion

Background: The Senate Bill contains provisions to allow AHPs in the form of "small business health plans" to form in other states and operate outside of New York's consumer protections. The small business health plans provisions are similar to a proposal which has passed the House of Representatives this year.[1] The Senate legislation would create a new ERISA article that would preempt state laws concerning AHPs.

AHPs Defined: AHPs are arrangements in which an insurance policy is held by an association to cover its members, or through which an association self-insures for the benefit of its members. An association may be a legitimate professional or trade association which incidentally offers health insurance to its members as a benefit. Or, an association may be established by an independent entity, like a professional employer organization (PEO), which exists to market a range of products including health insurance.

Concerns: The Senate Bill would preempt the authority of state governors, legislators, and insurance regulators to make and enforce rules for AHPs, including the benefits required to be covered, the financial solvency of insurers, the setting of premium rates, and any and all other vital protections provided to New York consumers. This disastrous provision would result in hidden costs for consumers and businesses, as well as doctors and hospitals, brokers and regional insurers.

Federal Preemption of State Law. The Senate Bill would impose federal ERISA preemption of state laws. AHPs would be used by national insurers as a means to evade compliance with state statutory and regulatory oversight. In response to a similar bill in the House, the NAIC has released a letter in opposition to that bill saying the bill threatens "the very core of a state regulatory system that has protected consumers for nearly 150 years."[2]

---

[1] H.R. 1101, 155th (2017).
[2] NAIC Letter to Reps. Foxx and Scott, February 28, 2017.

Hidden Costs Resulting from Federal Preemption and AHP Cherry Picking. The Senate Bill would seriously undermine state consumer, provider, broker and insurer protection efforts by allowing AHPs to evade state law while "insuring" New Yorkers' heath care.

Consumers and Businesses. Consumers and businesses face significant harm from the AHP provision in the Senate Bill.

- *Consumer Protection*. New Yorkers covered by AHPs would not have the benefit of New York's many consumer protection laws, including increased access to coverage for opioid treatments, reduced cost sharing for breast cancer, essential health benefits, and protection from surprise bills from out-of-network doctors
- *Premium Rates Increases*. By preempting state law, Congress would create a situation where AHPs are able to enter a market with a low-cost, minimal coverage plan, designed only to attract healthy lives. This would leave sicker individuals and groups in community-rated markets and would drive premiums up. The members in the AHP plan may also switch to a comprehensive community-rated health insurance policy once their medical needs increase. This type of adverse selection is unsustainable and would have an extremely negative impact on availability and affordability of health insurance.
- *Less Choice*. The Senate Bill would likely lead to fewer options for certain consumers and businesses. As the National Association of Health Underwriters (NAHU) noted in response to the House bill, "[i]f the initial adverse selection caused by the AHP resulted in traditional carriers leaving a state's small group market, employers that chose coverage through the AHP and then decided to leave the plan due to increasing rates may have no remaining health insurance choices."[3]
- *Solvency Problems*. The Senate Bill would preempt state oversight of insurer financial solvency. The American Academy of Actuaries (AAA) released an Issue Brief on AHPs noting that "AHPs face increased insolvency risk without clearly defined regulatory authority."[4] The Senate's ill-conceived proposal would undercut the traditional role of the states in regulating their own markets for health insurance and would leave consumers without protection of state oversight to ensure coverage will be there when they need it.
- *Consumer Confusion*. Consumers and their employers will be confused about which laws apply to their AHP coverage. Many will be troubled when they learn when they have a health issue or an insurance problem that they do not have the protections of New York law.

Providers. Doctors, hospitals and other providers also would be harmed by the Senate Bill.

- *Provider Protections*. Preemption of state provider protections would include New York laws requiring insurers to promptly pay claims, cover claims that have been preauthorized, and allow providers to opt out of unilateral changes to provider contracts by insurers.
- *Uncompensated Care*. AHPs would be permitted to offer less generous coverage than required in New York. This would result in New Yorkers either not obtaining health care services that they need or forcing providers to provide uncompensated care or chase patients to pay large medical bills.
- *Solvency Problems*. Preemption of state solvency oversight would leave providers at greater risk of not being paid for covered services.

---

[3] National Association of Health Underwriters, Issue Summary: Association Health Plans, *available at* http://www.nahu.org/media/media/kit/AHP_issue_summary.pdf

[4] American Academy of Actuaries, Issue Brief: Association Health Plans, February 2017.

Insurers. The Senate Bill would impact New York's many local and regional health insurers, undermining competition and creating an uneven playing field for large, national insurers to use AHPs to underprice and cherry pick healthy risk from local and regional insurers. This could result in solvency issues and local job loss.

Brokers. New York state brokers would be disadvantaged in selling these out-of-state AHPs. This could result in local job loss.

Conclusion: The NAIC, the AAA and NAHU agree that preempting state law to allow AHPs to operate to the detriment of the small group market would have devastating effects and destabilizing markets. The Senate Bill would preempt vital state consumer protections and allow AHPs to cherry-pick healthy risk causing adverse selection and harming the small group market. The hidden costs would impact consumers, businesses, providers, insurers and brokers. Among many other problematic provisions in the Senate Bill, the AHP provision would create significant negative consequences for New York's health care market.