EVERY TEXAN

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To: House Committee on Insurance
From: Stacey Pogue, senior policy analyst with Every Texan (formerly CPPP)
Date: April 6, 2021
Re: Reject HB 3923 to maintain consumer safeguards in association health plans (AHPs) / multiple employer welfare arrangements (MEWAs)

Summary:
HB 3923 by Representative Oliverson seeks to align state law regarding association health plans – those offered by business or professional associations to their members — with federal rules finalized in June 2018 and subsequently invalidated by a federal district court in March 2019. The ruling was appealed, but remains in effect. **In other words, even if this bill is passed, much of it could not be implemented today.** The appeals court recently placed a temporary hold on the appeal. Any efforts to align state law with the vacated rules may prove fruitless. Key changes sought under these bills are preempted under ERISA today and may remain so.

Regardless of the outcome of litigation on federal association health plan rules, it would be unwise to reduce Texas consumer protections for association health plans as this bill does. The National Association of Insurance Commissioners (NAIC) has described these plans as having "a colorful and troubling history" and being "notoriously prone to insolvencies." State guardrails for association health plans weakened by the bill were put into place in response to the long and well-documented history of fraud, abuse, and unpaid claims stemming from these plans. Unlike most states, Texas does not require that self-funded association health plans be licensed as insurers, and instead applies less financial oversight and fewer consumer protections.

According to the NAIC "[w]hile the promise of [these plans] has always been to give small employers access to low cost health coverage on terms similar to those available to large employers, that promise has never been the reality." **MEWAs, in fact, can actually drive up premiums for individuals and small businesses that need comprehensive coverage.** MEWAs are allowed to play by different rating and benefit rules, and can leverage that advantage to cherry-pick healthier customers out of the small employer and individual markets, causing their premiums to rise.

We acknowledge the need for more affordable coverage options for small employers and individuals and point you to two new developments. A state rule that took effect at the end of 2020 creates a new pathway for associations of small employers to buy fully-insured, large employer coverage. This new option conveys many of the purported benefits of association health plans, but without the threat of fraud and insolvency. The just-enacted American Rescue Plan Act boosts subsidies available in the Health Insurance Marketplace for two-years, making coverage more affordable for many Texans, including self-employed individuals and employees of small employers that do not provide coverage.

Background:

ERISA has a narrow exception for "bona fide" associations

Historically, the Department of Labor has granted a limited exception for coverage offered by an association of multiple employers to be treated as if it is a single large employer under ERISA. This framework is essentially mirrored in Texas Insurance Code Ch. 846, which governs multiple employer welfare arrangements or MEWAs. Association health plans (AHPs) are one type of MEWA. "Bona fide" associations that act in the interest of their employer members can qualify for the ERISA exception if association members:

- Join together with a primary purpose unrelated to offering health benefits,
- Share a genuine common business or trade interest, other than the provision of benefits,
- Exercise control over the AHP benefit program, and
- Are employers, each with one or more employees in addition to the business owner and spouse.

In theory, bona fide associations would be act in the interest of their members, just as employers are expected to act in the interest of their employees under ERISA, and thus could avoid more stringent state consumer protections necessary for commercial insurance transactions where the entity providing coverage wouldn't naturally act in the best interest of enrollees.

The currently-invalidated 2018 association plan rule greatly expanded the circumstances under which an association of multiple small employers and individuals could be treated as a single large employer, including by allowing associations of businesses in the same area, even if not in the same trade or profession. The rule also allowed self-employed individuals with no employee, called "working owners" in the rule, to get coverage through AHPs by counting the individual as both the employer and employee.

Federal association health plans rules invalidated; provisions in MEWA bills remain preempted

A district court ruling on March 28, 2019 invalidated all relevant sections of the federal association health plan rule, finding them inconsistent with ERISA. The ruling has been appealed, but remains in effect. In other words, even if these bills pass, they could not be implemented**.** The Department of Labor issued subsequent guidance stating that further sales or renewals of association health plans based on the invalidated rules are prohibited. The appeals court placed a temporary hold on the appeal in February 2021 to allow the incoming Biden Administration to review the case. The Biden Administration could rescind or amend the Trump-era AHP rule, and has been urged to do so by many leading national patient organizations.

Most changes sought under the four MEWA bills filed this session are preempted today – a fact confirmed in a recent Texas Department consent order with an association health plan operating in conflict with ERISA in Texas (#2020-6570). Any efforts to align state law with the vacated rules may prove fruitless. The following are key AHP rule provisions set aside by the district court but included in this bill:

- Allowing members of an association to demonstrate "commonality of interest" by being located in the same geographical area, for example within the same state or in different states if within the same metropolitan area.

- Allowing "working owners" – self-employed individuals with no employees – to count as both an employer *and* their own employee in order to become eligible for an AHP.

In addition, HB 3923 strikes a current Texas requirement that an association be in existence for at least two years before offering benefits (TIC Sec. 846.053(c)(2)). This protection helps demonstrate that employers have joined together in a bona fide association for a purpose unrelated offering health benefits.

Texas applies less scrutiny and fewer standards to self-funded AHPs today, putting enrollees at risk

Self-insured MEWAs contemplated in bills this session are subject to both ERISA and state regulation, to the extent that state law is not in conflict with ERISA. In 1983, Congress amended ERISA to explicitly allow states to also regulate self-funded AHPs, to better equip states to address widespread fraud and abuse by AHP operators that commonly claimed ERISA preemption from any state oversight.

In most states, self-insured MEWAs are subject to the same licensing requirements as traditional health insurers, but not in Texas. Texas subjects self-insured MEWAs to lower solvency standards than insurers, and they do not participate in a guaranty fund. This combination means MEWAS are both more prone to financial instability and insolvency and, when they fail, their members – smaller employers and, under the bills, self-employed individuals—are on the hook for unpaid medical bills. Small employers and individuals who buy coverage in a MEWA are likely ill-prepared to take on the bigger financial risk of MEWA coverage, and may not understand the additional financial exposure involved.

MEWAs in Texas are not subject to many key consumer and provider protections applied to health insurers, including network adequacy, surprise medical billing protections, the "prudent layperson" standard, and prompt pay laws. In Texas, MEWAs are exempt from all state health insurance laws outside of: (a) 19 enumerated exceptions listed in TIC Sec. 846.003, and (b) any chapter or provision outside of Ch. 846 that is explicitly applies to MEWAs despite the general exemption in TIC Sec. 846.003.

We note that HB 3923 by Oliverson is unique among MEWA bills this session in that it applies certain state consumer and provider protections to MEWAs if they offer comprehensive coverage, including standards for reserves, appeal rights, surprise medical billing protections, and PPO-related standards. These features are an improvement, but do not provide consumer protection on par with traditional coverage. MEWAs will still be able to use different benefit and rating rules to their advantage, driving up premiums for other privately insured small businesses and individuals (more below).

Texas consumers have been harmed by a long history of fraud, abuse, and insolvencies in MEWAs.

MEWAs have a track record marred by fraud, abuse, and insolvency that continued even with added state oversight since 1983. The National Association of Insurance Commissioners describes MEWAs as having "a colorful and troubling history" and noted that "[w]hile the promise of MEWAs has always been to give small employers access to low cost health coverage on terms similar to those available to large employers, that promise has never been the reality."

The General Accounting Office (GAO) has examined multiples cycles of AHP-related scams and found that fraudulent AHPs have stranded hundreds of thousands of consumers with unpaid medical bills totaling several hundred million dollars. In testimony before Congress, a prior Texas Insurance Commissioner noted that the nature of AHPs, "creates the opportunity for scams to operate for significant periods of time before they are recognized as illegal," and that even though the Texas Department of Insurance can shut down fraudulent AHPs, it "normally cannot do so until after they have already done a great deal of damage to the public."

Legitimate MEWAs have also harmed consumers through a long history of insolvencies that continues to this day. As recently as December, DOL took action against a failing MEWA accused of financial mismanagement that enrolled 35,000 employees across 38 states, including those in Texas. According to the National Association of Insurance Commissioners, "[e]ven well-intentioned non-fully-insured MEWAs have been notoriously prone to insolvencies." Because even legitimate, self-insured MEWAs face a higher risk of financial instability and insolvency, state regulators must allocate significant resources to monitor them.

MEWAs raise the costs of coverage for other small employers and individuals

MEWAs can cherry-pick healthier customers and small businesses because they play by different rating and benefit rules. Unlike health insurance, MEWAs do not have to cover "essential health benefits," and they can charge more based on gender, age, size of business, and type of business. As healthier individuals and small businesses are siphoned out of the traditional risk pool, the individual and small employer insurance markets will shrink and have a greater proportion of older and sicker enrollees than they would otherwise. This will drive up premiums for the people and small businesses who need access to comprehensive coverage.

Conclusion:

HB 3923 seeks to erode the already-insufficient guardrails in state law for MEWAs, which were put into place because of the well-documented history of fraud, abuse, and unpaid claims from these plans. In addition, if passed, much of the bill could not be implemented today because it is inconsistent with ERISA. **We urge you to maintain adequate consumer safeguards in association health plans and reject this bill.**