NFIB
The Voice of Small Business.
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Via www.regulations.gov
and U.S. First Class Mail

January 23, 2018

The Honorable R. Alexander Acosta
Secretary of Labor
c/o Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Definition of Employer--Small Business
Health Plans RIN 1210-AB85
U.S. Department of Labor, Room N-5655
200 Constitution Avenue NW
Washington, DC 20210

Dear Mr. Secretary:

RE: Comments in Response to Notice of Proposed Rulemaking, "Definition of 'Employer' Under Section 3(5) of ERISA--Association Health Plans," RIN 1210-AB85, 83 *Fed. Reg.* 614 (January 5, 2018)

The National Federation of Independent Business submits these comments on the Department of Labor notice of proposed rulemaking titled "Definition of 'Employer' Under Section 3(5) of ERISA--Association Health Plans" in the *Federal Register* of January 5, 2018 ("DOL Notice"). The DOL Notice proposed a rule that construes broadly the commonality element applied to the term "employer" in section 3(5) of the Employee Retirement Income Security Act (ERISA),[1] to facilitate establishment of more Association Health Plans (AHPs) as multiple employer health insurance plans.

Repeal of the scheme established by the Patient Protection and Affordable Care Act (PPACA)[2] and its replacement by patient-centered, market-based healthcare remains essential, but NFIB appreciates that the DOL Notice focuses on how to reduce the damage the PPACA inflicts while it remains in force. No amount of regulatory changes can solve the problems with the PPACA, which increases costs and reduces flexibility for small business owners. Small businesses need the affordable, flexible, and predictable health insurance that a truly free market in health insurance would provide.

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[1] 29 U.S.C. 1002(5) ("(5) The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity." (emphasis added)).

[2] Public Law 111-148 (March 23, 2010), amended by the Health Care and Education Reconciliation Act, Public Law 111-152 (March 30, 2010), and also known as the Affordable Care Act, ACA, or "Obamacare."

NFIB is an incorporated nonprofit association representing small and independent businesses, with about 300,000 members across America. NFIB protects and advances the ability of Americans to own, operate, and grow their businesses and, in particular, ensures that the governments of the United States and the fifty States hear the voice of small business as they formulate public policies. Many NFIB members make health insurance available to their employees; many other NFIB members wish they could afford to do so. Thus, many NFIB members have a substantial interest in the regulation proposed by the DOL Notice.

The table of contents for these NFIB comments is set forth below. NFIB recommendations for specific changes to the regulation proposed in the DOL Notice appear in boldface type in these comments for the convenience of the reader.

Table of Contents of NFIB Comments

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I. AHP Goal: Large Group Insurance Coverage and Reduced State-Level Regulation

ERISA recognizes multiple employer welfare arrangements (MEWA) for the benefit of employees.[3] If a MEWA also qualifies as an ERISA "employee welfare benefit plan" (EWBP) much of the regulation of the plan generally occurs at the federal level, with federal law and regulations preempting many State insurance law and regulations. If a MEWA does not qualify as an EWBP, much of the regulation occurs at the State level, under State insurance law and regulations.[4]

Principally for two reasons, employer-members of associations have an interest in EWBPs commonly known as Association Health Plans that qualify under ERISA as multiple employer benefit plans. First, those AHPs give the employers access to large group insurance contracts, which generally have better choices of coverage at lower premiums due to the spreading of insurance risk across larger populations.[5] Secondly, much of the

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[3] 29 U.S.C. 1002(40)(A) ("(A) The term 'multiple employer welfare arrangement' means an employee welfare benefit plan, or any other arrangement (other than an employee welfare benefit plan), which is established or maintained for the purpose of offering or providing any benefit described in paragraph (1) to the employees of two or more employers (including one or more self-employed individuals), or to their beneficiaries," with specified exceptions).

[4] See 29 U.S.C. 1144(b)(2) and (6). For a description of the scope of ERISA federal preemption of state insurance regulation, see DOL Notice, 83 *Fed. Reg.* at 617 cols. 2-3, 625 cols. 1-2, and 634 col. 2 (January 5, 2018).

[5] For a discussion of the benefits to small business of access to large group treatment, see sec. 1(b)(i) of Executive Order 13813 of October 12, 2017, and DOL Notice, 83 *Fed. Reg.* at 618 col. 3 and 619 col. 1 (January 5, 2018). Part of the improved choices results from the inapplicability to large groups of federal regulatory requirements. As stated in the DOL Notice:

> *With respect to insured coverage, whether coverage is offered in the individual, small group, or large group market affects compliance obligations under the Affordable Care Act and other State and Federal insurance laws. For example, only individual and small group market health insurance coverage is subject to the requirement to cover essential health benefits as defined under section 1302 of the Affordable Care Act. Moreover, the risk adjustment program, which transfers funds from plans with lower-risk enrollees to plans with higher-risk enrollees, applies only to health insurance issuers offering coverage in the individual and small group markets, not the large group market. The single risk pool requirement, which requires each health insurance issuer to consider the claims experience of all individuals enrolled in plans offered by the issuer in the individual market to be in a single risk pool, and all its individuals in the small group market to be members of a single risk pool, also applies only in the individual and small group markets, not the large group market. In addition, the health insurance premium rules that prohibit issuers from varying premiums except with respect to location, age (within certain limits), family size, and tobacco-use (within certain limits) apply only in the individual and small group markets. Finally, the Medical Loss Ratio (MLR) provisions, which limit the portion of premium dollars health insurance issuers may spend on administration, marketing, and profits establish different thresholds for the small group market and the large group market. Self-insured group health plans are exempt from each of these obligations regardless of the size of the employer that establishes or maintains the plan. . . .*

83 *Fed. Reg.* at 618 cols. 1 and 2 (January 5, 2018) (footnotes omitted).

regulation occurs at the federal level rather than at the state level, which often allows easier, more uniform, and less costly administration of plans across state lines.[6]

Absent qualification under ERISA as a multiple employer plan, ERISA treats a health insurance plan offered by an association to its employer-members as a collection of individual (in the case of sole proprietors and non-offering employers) or small group (in the case of offering employers) insurance plans, which prevents them from receiving the benefits of large group treatment. Small business employers, in particular, would benefit from expanded availability under ERISA of multiple employer Association Health Plans, as small businesses may not have any other means to gain access to large group insurance contracts.

II. Statutory Background: DOL Requirements of "Commonality of Interest" and "Control" for Association Multi-Employer Health Insurance Plan

Section 3(1) of ERISA defines the term "employee welfare benefit plan" to mean among other things "any plan . . . established or maintained by an employer . . . to the extent that such plan . . . was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death . . ." (emphasis added).[7] An association that wishes to offer an "employee welfare benefit plan" such as health insurance must meet the ERISA definition of an "employer."

Section 3(5) of ERISA defines the term "employer" to mean "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity" (emphasis added). This definition of "employer" includes an "association of employers" that acts "in the interest" those employers "in relation to an employee benefit plan," such as a health insurance plan (also known as an Association Health Plan).

Federal courts and DOL advisory opinions have applied the section 3(5) phrases "group or association of employers acting for an employer" and acting "in the interest of the employer" in relation to employee welfare benefit plans as if they require two elements:

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[6] DOL may want to consider asking the President to submit to Congress proposed legislation that would more fully if not completely preempt state laws and regulations affecting AHPs, so as to facilitate the ability of otherwise qualified national associations to offer to their employer-members across the country better choices at more affordable prices and with easier, more uniform, and less costly administration of plans without regard to state lines. Admittedly, such a legislative proposal could face significant resistance from state legislators, state regulators, and health insurance-related businesses that have designed their businesses specifically around the laws and regulations of a particular state to operate in markets only within that state.

[7] 29 U.S.C. 1002(1). Section 3(1) also allows an employee organization (e.g., a union), or both and employer and employee organization together, to establish an employee welfare benefit plan. These comments address associations (such as traditional trade associations) that are neither an employee organization (e.g., union) nor a combination of an employer and an employee organization.

(1) commonality of interest, and (2) control. Absent either commonality or control, an association cannot offer an AHP that DOL will treat as a multi-employer health insurance plan for the employees of the association's employer-members.

a. Qualification of Association to Offer AHP: Commonality-of-Interest Requirement

DOL describes the "commonality-of-interest" requirement for meeting the ERISA definition of "employer" as follows:

> *In distinguishing employer groups or associations that can act as an ERISA section 3(5) employer in sponsoring a multiple employer plan from those that cannot, the touchstone has long been whether the group or association has a sufficiently close economic or representational nexus to the employers and employees that participate in the plan. This "commonality of interest" requirement distinguishes bona fide groups or associations of employers who provide coverage to their employees and the families of their employees from arrangements that more closely resemble State-regulated private insurance offered to the market at large.*[8]

In 1986, the U.S. Court of Appeals for the Eighth Circuit, in a case involving a teacher's union ("employee organization") health insurance plan that offered coverage both to union members and non-members, held that the plan did not qualify as an ERISA employee welfare benefit plan, because:

> *The definition of an employee welfare benefit plan is grounded on the premise that the entity that maintains the plan and the individuals that benefit from the plan are tied by a common economic or representation interest, unrelated to the provision of benefits.*

In rejecting ERISA qualification for the plan, the Court of Appeals noted that the "relationship between the sponsoring labor union and these non-member recipients" is "similar to the relationship between a private insurance company, which is subject to myriad state insurance regulations, and the beneficiaries of a group insurance plan."[9]

In 1998, the U.S. Court of Appeals for the Third Circuit, in a case involving a Lake Erie Employers' Association (LEEA) that was open for membership to any business in northwest Pennsylvania with at least 5 but fewer than 150 employees and offered a health insurance plan, held that the plan did not qualify as an ERISA employee welfare benefit plan because:

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[8] DOL Notice, 83 *Fed. Reg.* at 616 col. 3 (January 5, 2018).

[9] *Wisconsin Education Association Insurance Trust v. Iowa State Board of Public Instruction*, 804 F. 2d 1059, 1063 (8th Cir. 1986), *rehearing denied* (8th Cir. February 10, 1987). *Accord, MDPhysicians & Associates, Inc. v. State Board of Insurance*, 957 F. 2d 178, 185 (5th Cir. 1992), *cert. denied*, 506 U.S. 861 (1992).

Congressional commentary, Department of Labor (DOL) advisory opinions, and case law from other circuits applying ERISA to multi-employer plans have interpreted the statute to preclude ERISA coverage of plans established for entrepreneurial purposes.

Giving effect to the intention to exclude entrepreneurial ventures, the cases and advisory opinions have imposed two broad requirements for a multi-employer plan to constitute an EWBP. First, the group of employers that establishes and maintains the plan must be a "bona fide" association of employers "tied by a common economic or representation interest, unrelated to the provision of benefits." Second, the employer-members of the organization that sponsors the plan must exercise control, either directly or indirectly, both in form and in substance, over the plan. . . .

Courts considering the issue have found that a sufficient bond exists between employers engaged in the same line of business in the same geographical area, but they have consistently rejected the contention that heterogenous businesses that share nothing more than a common size and a high regard for the "entrepreneurial spirit" enjoy such a bond. The LEEA plan bears a greater resemblance to the latter types of organizations than the former. . . .

In short, the only common trait that LEEA employer-members possessed was that they employed fewer than 225 [sic] *employees. However, common size is not a bona fide organizational relationship. Accordingly, LEEA was not a "bona fide employer organization" that could establish and maintain an EWBP within the meaning of ERISA.*[10]

DOL has advised that "[t]he representational link between employees and an association of employers in the same industry who establish a trust for the benefit of those employees" supplies the "requisite connection" to meet the commonality-of-interest requirement.[11] Thus, an industry association can establish for its employer-members an employee welfare benefit plan to provide health insurance through a multi-employer plan for the employees of the employer-members -- if the association also satisfies the other key requirement: "control."

b. Qualification of Association to Offer AHP: Control Requirement

Section (3)5 of ERISA defines "employer" to include an "association of employers" that acts "in the interest" of those employers "in relation to an employee benefit plan," such as a health insurance plan (also known as an Association Health Plan). Under current DOL advisory opinions, an association cannot qualify as an ERISA "employer," and therefore cannot offer an ERISA-covered multi-employer health insurance plan to its employer-members for their employees, unless the employer-members have control of the plan. The U.S. Court of Appeals for the Third Circuit has stated that "the control requirement is a

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[10] *Gruber v. Hubbard Bert Karle Weber, Inc.*, 159 F. 3d 780, 786-788 (3d Cir. 1998) (citations omitted).

[11] DOL Advisory Opinion 2008-07A.

reasonable means of ensuring that the administrators of multi-employer welfare benefit plans in fact act 'in the interest of' their employer members."[12]

DOL has stated specifically that an association cannot qualify as an ERISA "employer," with respect to a multi-employer employee welfare benefit plan program for the association's employer-members, if those employer-members do not "either directly or indirectly, exercise control over that program, both in form and in substance."[13] Of particular interest to trade associations, DOL has advised that, "in cases where the employers who participate in the plan do not have the ability to control the association (*e.g.*, where the employers participating in the plan do not have voting control over the governing body of the association), the association itself cannot serve as the 'employer' sponsoring the plan because the participating employers would not be able to control the plan through control of the association."[14] The DOL Notice proposes rules that would loosen the commonality-of-interest requirement, but preserve the control requirement, for multi-employer Association Health Plans.[15]

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[12] *Gruber v. Hubbard Bert Karle Weber, Inc.*, 159 F. 3d 780, 787 (3d Cir. 1998).

[13] DOL Advisory Opinion 94-07A; see also, Advisory Opinions 96-25A, 2001-04A, and 2017-02AC.

[14] DOL Advisory Opinion 2017-02AC. Suppose, for example, that an association represents employers who are dues-paying subscribers to the association, but that the association is organized as a corporation without statutory members and is governed by a board of directors that elects successor directors from among the employer-subscribers. Under DOL advisory opinions, that association could not offer its employer-subscribers a multi-employer AHP because the employer-subscribers do not have voting control of the association's board of directors. Although the association could not establish a multi-employer AHP insurance plan, the association could (to the extent otherwise permitted by law) serve as the fiduciary or plan administrator for an AHP established by employers separate from the association, as long as the members controlled the AHP, including the selection or dismissal of the fiduciary or plan administrator (DOL Advisory Opinion 2017-02AC, note 2). Also, it would appear that, if the law of a given state permits, the association could establish a non-ERISA health insurance plan for subscriber-employers in that state, under state insurance laws and regulations. DOL Notice, 83 *Fed. Reg.* at 616 col. 1 (January 5, 2018) ("It is important to note that the proposed regulation would not preclude associations that do not meet the conditions of the proposal from offering health coverage in accordance with existing ACA requirements and applicable State insurance regulation.") Association missions, staff expertise on health administration, administrative, legal, and accounting costs, and other market factors would determine whether an association and its subscribers would in reality benefit from having an association assume a theoretically possible fiduciary or plan administrator function for a non-ERISA plan, or establish multiple non-ERISA plans under state laws. It is hard to imagine, for example, that most national associations could provide the necessary expertise and efficiency to compete economically with a commercial fiduciary or commercial plan administration organization, or could compete economically while incurring the administrative, legal, and accounting costs to operate insurance plans that must meet, without preemption of states by ERISA, the requirements of 50 separate sets of varying insurance laws and regulations of the states.

[15] DOL Notice, 83 *Fed. Reg.* at 620 col. 3 (January 5, 2018) ("The proposed regulation would also retain the requirement in the Department's existing sub-regulatory guidance under section 3(5) of ERISA that an AHP's employer-members control the AHP. This requirement is necessary to satisfy the statutory requirement in ERISA section 3(5) that the group or association must act 'in the interest of' the direct employers in relation to the employee benefit plan, and to prevent formation of commercial enterprises that claim to be AHPs but, in reality, merely operate similar to traditional insurers selling insurance in the group market.")

III. Recommended Changes to Rule Proposed by DOL Notice

In section 1(b)(i) of Executive Order 13813 of October 12, 2017, the President emphasized the importance of expanding AHPs for the benefit of small employers:

> *Large employers often are able to obtain better terms on health insurance for their employees than small employers because of their larger pools of insurable individuals across which they can spread risk and administrative costs. Expanding access to AHPs can help small businesses overcome this competitive disadvantage by allowing them to group together to self-insure or purchase large group health insurance. Expanding access to AHPs will also allow more small businesses to avoid many of the PPACA's costly requirements. Expanding access to AHPs would provide more affordable health insurance options to many Americans, including hourly wage earners, farmers, and the employees of small businesses and entrepreneurs that fuel economic growth.*

In section 2 of the Order, the President directed the Secretary of Labor as follows:

> *Within 60 days of the date of this order, the Secretary of Labor shall consider proposing regulations or revising guidance, consistent with law, to expand access to health coverage by allowing more employers to form AHPs. To the extent permitted by law and supported by sound policy, the Secretary should consider expanding the conditions that satisfy the commonality-of-interest requirements under current Department of Labor advisory opinions interpreting the definition of an "employer" under section 3(5) of the Employee Retirement Income Security Act of 1974. The Secretary of Labor should also consider ways to promote AHP formation on the basis of common geography or industry.*

In sections 1 and 2 of the Order, the President made his objective clear: to "help small businesses overcome" the competitive disadvantage of lack of access to large group health insurance and "to expand access to health coverage by allowing more employers to form AHPs." The President also suggested two ways the Secretary could consider achieving that objective: (1) "consider expanding the conditions that satisfy the commonality-of-interest requirements," and (2) "consider ways to promote AHP formation on the basis of common geography or industry." The DOL Notice adopted the two presidential suggestions, but did little more to achieve the President's objective of expanding access to health coverage through AHPs. The comments below address DOL's implementations of the President's suggestions, but also address additional ideas for achieving the President's objective.

a. Group or Association of Employers: Follow Statute and Delete "Bona Fide" (Proposed 29 CFR 2510.3-5(b))

Section 3(5) of ERISA defines the term "employer" to mean "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity." Section 3(5) refers to a "group or association of employers," which is a phrase that has no further definition in ERISA. Assuming DOL is correct that "[t]he ERISA

statutory definition of the term 'employer,' which includes direct employers and any other person acting indirectly in the interest of the employer in relation to an employee benefit plan, including a group or association of employers, is not an unambiguous term that leaves no room for agency discretion,"[16] then DOL can argue that it may by regulation reasonably resolve the ambiguity.[17]

In resolving a statutory ambiguity with a reasonable interpretation, DOL must hew to the language of the statute. DOL's proposed definition of the statutory term "group or association of employers," which appears in proposed 29 CFR 2510.3-5(b), modifies the statutory phrase with the term "bona fide." The statute does not use the term "bona fide" -- that term was initiated by DOL in its advisory opinions to distinguish between associations that met the requirements to establish a multi-employer employee welfare benefit plan (which DOL labeled "bona fide" associations) and associations that did not meet those requirements, which DOL viewed as akin to private commercial insurance marketers. Since the purpose of the regulation is to construe what DOL says is an ambiguous term in the statute, DOL should adhere to the statutory language without introducing language of its own that appears nowhere in the statute. **DOL should revise 29 CFR 2510.3-5(b) by changing the caption of subsection (b) to read "*Group or association of employers*", striking "bona fide" from the chapeau of the subsection, and making conforming changes by deletion of "bona fide" in each other place it appears in the rule proposed by the DOL Notice.**

b. Expand Governance Alternatives: "Governing Authority," Not "Governing Body" (Proposed 29 CFR 2510.3-5(b)(3))

The DOL Notice includes as a requirement for a group or association of employers seeking to qualify to offer a multi-employer employee welfare benefit plan that the group or association have a formal organizational structure with (1) a "governing body," and (2) by-laws or other similar indications of formality. The phrase "governing body" implies a multi-person authority,[18] but a group or association (for example, one organized as a limited

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[16] DOL Notice, 83 *Fed. Reg.* at 623 col. 1 (January 5, 2018).

[17] *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984) ("When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." (footnotes omitted)).

[18] Merriam Webster Dictionary (Online), definition of "body" in relevant sense: "a group of persons or things: such as [a] : a fighting unit : force, a *body* of cavalry, [b] : a group of individuals organized for some purpose, a legislative *body*, the university's student *body*.", available at https://www.merriam-webster.com/dictionary/body (visited January 9, 2018).

liability company) might have a single executive as its governing authority under its governance documents.[19] **DOL should revise 29 CFR 2510.3-5(b)(3) by striking "with a governing body" and inserting "with a governing authority".**

c. Allow Demonstration in Ways Other than "Control" that Association Acts "in the Interest of" Employer-Members (Proposed 29 CFR 2510.3-5(b)(4))

While "the control requirement is a reasonable means of ensuring that the administrators of multi-employer welfare benefit plans in fact act 'in the interest of' their employer members,"[20] it is by no means the only reasonable means of doing so. DOL created the "control" test to implement the requirement in section 3(5) of ERISA that an association providing a multi-member employee welfare benefit plan act "indirectly in the interest of an employer, in relation to an employee benefit plan." DOL reasonably concluded that, if the employer-members of an association control the governing body of the association (for example, as in an incorporated association governed by a board of directors that the employer-members elect), the association will act "in the interest" of the employer-members.

DOL's control test construes too narrowly the "in the interest" text of the statute. The presence of employer-member control ensures that the association will act "in the interest" of the employer-members, but the absence of employer-member control does not mean the association cannot act "in the interest" of the employer-members. When the employer-members of the association do not control the association's governing body or authority, DOL should remain open to demonstration by other means that the association acts "in the interest" of the employer-members with respect to the employee welfare benefit plan. Thus, "control" should be a safe harbor guarantee that DOL will assume that the association acts "in the interest" of the employer-members, but DOL should allow an association in the absence of such "control" to demonstrate to DOL through other means that it acts "in the interest" of its employer-members. **DOL should revise 29 CFR 2510.3-5(4) to read:**

> **"(4) The group or association acts in the interest of its employer-members in relation to an employee welfare benefit plan, by (A) control by the employer-members of the group or association of the functions and activities of the group or association (including the establishment and maintenance of the plan)**

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[19] See, for example, the Delaware Limited Liability Company Act, 6 Del. C. § 18-407 (articles of agreement may provide that one person exercises all rights, powers and duties to manage and control the business and affairs of a limited liability company) or the Texas Limited Liability Companies law, V.T.C.A. § 101.251 ("The governing authority of a limited liability company consists of: (1) the managers of the company, if the company's certificate of formation states that the company will have one or more managers; or (2) the members of the company, if the company's certificate of formation states that the company will not have managers.")

[20] *Gruber v. Hubbard Bert Karle Weber, Inc.*, 159 F. 3d 780, 787 (3d Cir. 1998).

directly, or indirectly through the regular nomination and election of directors, officers, or other similar representatives that control such functions and activities; or (B) in the absence of such control, by demonstrating to the Secretary that the group or association otherwise acts in the interest of its employer-members in relation to such a plan, including but not limited to by demonstrating the existence of a fiduciary or contractual duty to so act and thereafter, from time to time (not more often than annually) as appropriate, a practice of carrying out that duty;".

d. Recognize Small Business Size as a Commonality of Interest (Proposed 29 CFR 2510.3-5(c))

In administering ERISA provisions concerning associations offering group health plans to its employer-members, DOL has long sought to distinguish between traditional associations serving their employer-members with a group health plan (which DOL often calls "bona fide" associations) and entities that more closely resemble purveyors of state-regulated private insurance to the market at large that purport to be associations. DOL has distinguished between the two in part by requiring that an association have a sufficiently close economic or representational nexus to the employers and employees who participate in the plan. As stated above, DOL has advised that "[t]he representational link between employees and an association of employers in the same industry who establish a trust for the benefit of those employees" supplies the "requisite connection" to meet the commonality-of-interest requirement.[21]

The rule proposed in the DOL notice would find the requisite connection to meet the commonality requirement in the relationship between an association and its employer-members if the employer-members are in the same: (1) trade, (2) industry, (3) line of business, (4) profession, (5) state (i.e., they have principal places of business there), or (6) metropolitan areas, whether in a single state or not (i.e., they have principal places of business there). But, again, in section 1(b)(i) of Executive Order 13813 of October 12, 2017, the President made clear that the attribute that mattered most with respect to AHPs was the small size of businesses, and the people whom he was most trying to help with AHPs were small businesses:

> *Large employers often are able to obtain better terms on health insurance for their employees than small employers because of their larger pools of insurable individuals across which they can spread risk and administrative costs. Expanding access to AHPs can help small businesses overcome this competitive disadvantage by allowing them to group together to self-insure or purchase large group health insurance. Expanding access to AHPs will also allow more small businesses to avoid many of the PPACA's costly requirements. Expanding access to AHPs would provide more affordable health insurance options to many Americans, including hourly wage earners, farmers, and the employees of small businesses and entrepreneurs that fuel economic growth.*

[21] DOL Advisory Opinion 2008-07A.

The DOL "commonality of interest" list in proposed 29 CFR 2510.3-5(c) fails to include the commonality about which the President cared most -- the small size of businesses.[22] And there plainly is as much or more commonality of interest in an economic or representational context for an association of employers of, say, 50 or fewer employees as there is for an association of all employers with principal places of business in Connecticut or an association of all employers with principal places of business in New York City. **DOL should revise proposed 29 CFR 2510.3-5(c) by striking "or" between paragraphs (1) and (2), striking the period at the end of paragraph (2) and inserting "; or"; and adding at the end the following new paragraph: "(3) Employers being small in size, as measured by the number of their employees."**

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[22] Decisions in cases such as *Moideen v. Gillespie*, 55 F. 3d 1478, 1482 (9th Cir. 1995) (". . . the characteristic of being an employer of 500 persons or less, in any line of work, cannot serve as an organizing principle.") and *Gruber v. Hubbard Bert Karle Weber, Inc.*, 159 F. 3d 780, 788 (3d Cir. 1998) (". . . common size is not a bona fide organizational relationship") do not prevent DOL from adopting the change to allow small size of a business as a commonality of interest. The *Moideen* court disallowed size as an organizing principle because it said it had already decided that a group of "heterogeneous, unrelated employers" could not qualify as an ERISA employer to establish an ERISA-covered multiple employer health insurance plan in *Credit Managers Association v. Kennesaw Life and Accident Insurance Co.*, 809 F. 2d 617, 625 (9th Cir. 1987). But the *Credit Managers* court, in rejecting as an ERISA employer a group of "heterogeneous, unrelated employers," indicated that it was deferring to and applying DOL's statutory construction: ". . . [T]he Department of Labor will recognize an ERISA plan established by a 'cognizable group or association of employers' if there is some 'organizational relationship' among them," 809 F. 2d at 625. Similarly, the *Gruber* court, in rejecting common size as a commonality of interest, cited *Moideen* on the point, which in turn cited *Credit Managers*, which in turn cited DOL. The bottom line is that the courts have in essence deferred to DOL's creation of the commonality-of-interest requirement and the application of it to bar size as an indicator of commonality, but the courts have not construed ERISA itself as barring small size as an indicator of commonality. In *Wisconsin Education Association Insurance Trust v. Iowa State Board of Public Instruction*, 804 F. 2d 1059, 1065 (8th Cir. 1986) the court said its decision that the group offering a plan and its beneficiaries must be tied by a common economic or representation interest was "premised on ERISA's language and Congress' intent" and that there was "no need to resort to the Department of Labor's interpretations," but nothing in the opinion indicated that ERISA would prohibit the small size of business as a measure of a common economic or representation interest. As the DOL Notice (83 *Fed. Reg.* at 622 col. 3 - 623 col. 1) states, "the Department has the authority to supersede its previous interpretations, as articulated in non-binding advisory opinions, to address marketplace developments and new policy and regulatory issues, *see generally Perez v. Mortgage Bankers Assn*, 135 S. Ct. 1199 (2015), and the authority to supersede a prior interpretation by a federal court, *see National Cable & Telecommunications Ass'n v. Brand X internet* [sic] *Services (Brand X)*, 545 U.S. 967, 125 S. Ct. 2688 (2005) ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."); see, *New England Power Generators Association, Inc. v. Federal Energy Regulatory Commission*, No. 16-1023 (D.C. Cir. January 19, 2018) ("So long as any change is reasonably explained, it is not arbitrary and capricious for an agency to change its mind in light of experience, or in the face of new or additional evidence, or further analysis or other factors indicating that the agency's earlier decision should be altered or abandoned."). Thus, DOL may revise its rules and guidance to allow small business size to serve as an acceptable commonality of interest with respect to association establishment and maintenance of ERISA-qualified multi-employer Association Health Plans.

e. Eliminate Anti-Marriage Policy for Sole Proprietors in Association Health Plans (Proposed 29 CFR 2510.3-5(e)(2)(iii))

The DOL Notice makes a significant worthwhile advance in DOL policies on multi-employer Association Health Plans under ERISA with its recognition of a working sole proprietor as both an employer-member of an association and as an employee of that employer-member, rendering inapplicable in this context the "plans without employees" restrictions in 29 CFR 2510.3-3. But the proposed rule imposes one restriction on a sole proprietor that it should not -- a requirement that the sole proprietor give up coverage under an ERISA-qualified multi-employer Association Health Plan if the sole proprietor marries a person who has subsidized group health insurance through the person's work. If the sole proprietor has better health coverage through the Association Health Plan than the spouse has through the spouse's employer, the sole proprietor and spouse should be free like other similarly-situated married couples to choose which plan's coverage they keep. DOL should not force a sole proprietor to choose between having good health insurance coverage or having a spouse. **DOL should revise proposed 29 CFR 2510.3-5(e)(2)(iii) by striking "or of the spouse of the individual".**

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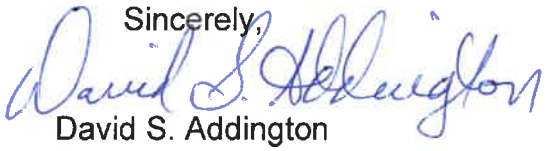
While repeal of the scheme enacted by the Patient Protection and Affordable Care Act and its replacement by patient-centered, market-based healthcare remains essential, NFIB appreciates efforts by the Department of Labor to implement the President's direction in Executive Order 13813 of October 12, 2017 to expand the availability of Association Health Plans for the benefit of small business employers and their employees. NFIB urges the Department to proceed with a final rule that includes the changes recommended above.

Sincerely,



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