CREDIT UNION ASSOCIATION OF THE DAKOTAS

March 6, 2018

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N–5655,
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

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RE: Definition of Employer—Small Business Health Plans RIN 1210–AB85

To Whom it May Concern:

The Credit Union Association of the Dakotas (CUAD) appreciates the opportunity to provide comment to the U.S. Department of Labor (Department) regarding its proposed rule to amend the definition of "Employer" under Section 3(5) of ERISA – Association Health Plans (AHPs). To provide a brief background, the Credit Union Association of the Dakotas represents state and federally chartered credit unions in the states of North Dakota and South Dakota.

Based on September 2017 National Credit Union Administration (NCUA) Call Report data, there are 76 state and federally chartered credit unions in the states of North Dakota and South Dakota. These credit unions employ a total of 1,847 full-time employees and 199 part-time employees. Again, as of September 2017, 34 of these credit unions had five or fewer full-time employees. Only five credit unions in North and South Dakota employ more than 100 full-time employees with the largest credit union reporting 303 full-time employees. The Affordable Care Act (ACA) has caused small group insurance premiums to increase significantly, and our small credit unions located in North Dakota and South Dakota have seen these increases first hand.

The Credit Union Association of the Dakotas launched a Health Care Trust on January 1, 2018, for affiliated credit unions domiciled in North Dakota. CUAD is in the process of effectuating legislative changes in South Dakota statutes governing multiple employer trusts that would be needed to allow us to serve our affiliated South Dakota credit unions. It is very important to credit unions to be able to provide their employees with healthcare insurance options. However, the cost to do so has increased significantly. The opportunity to provide the Health Care Trust in North Dakota has greatly benefited North Dakota credit unions and their employees and it is our goal to

bring this benefit to South Dakota credit unions as well so they can provide affordable healthcare insurance options to their employees.

CUAD supports the Department's "goal of the rulemaking is to expand access to affordable health coverage, especially among small employers and self-employed individuals, by removing undue restrictions on the establishment and maintenance of association health plans under ERISA." *83 FR 614* However, as discussed below, CUAD does have concern regarding portions of the Department's proposed rule change regarding nondiscrimination as we believe it will hinder association health plans. Specifically, proposed §2510.3-5(d)(4) would provide, "In applying the nondiscrimination provisions of paragraphs (d)(2) and (3) of this section, the group or association may not treat different employer members of the group or association as distinct groups of similarly-situated individuals." *83 FR 634* CUAD is concerned that this provision will be very negative toward AHPs and potentially reduce their viability (including the viability of CUAD's recently launched Health Care Trust) in the marketplace.

As noted in its discussion of the proposed rule, on October 12, 2017, President Trump issued Executive Order 13813, ''Promoting Healthcare Choice and Competition Across the United States,'' stating that ''[i]t shall be the policy of the executive branch, to the extent consistent with law, to facilitate the purchase of insurance across State lines and the development and operation of a healthcare system that provides high-quality care at affordable prices for the American people.'' *83 FR 614*

Proposed § 2510.3–5(b) lists the requirements that a bona fide group or association of employers must meet to be able to establish an employee welfare benefit plan. These requirements include, "the employer members have a commonality of interest as described in paragraph (c) of this section." Commonality of interest of employer members of a group or association will be determined based on relevant facts and circumstances and may be established by: (1) Employers being in the same trade, industry, line of business or profession; or (2) Employers having a principal place of business in a region that does not exceed the boundaries of the same State or the same metropolitan area (even if the metropolitan area includes more than one State). *83 FR 635* CUAD supports the Department's proposed requirements to be an association of employers including commonality of interest requirements.

Proposed § 2510.3–5(b) also includes the requirement that "the group or association and health coverage offered by the group or association complies with the nondiscrimination provisions of paragraph (d) of this section." *83 FR 635* Proposed § 2510.3–5(d) requires that a bona fide group or association, and any health coverage offered by the bona fide group or association, must comply with certain nondiscrimination provisions. As noted above CUAD does have concern regarding proposed §2510.3-5(d)(4) which would provide, "In applying the nondiscrimination provisions of paragraphs (d)(2) and (3) of this section, the group or association may not treat different employer

members of the group or association as distinct groups of similarly-situated individuals." *83 FR 635* This provision will be very negative toward AHPs and potentially reduce their viability in the marketplace.

CUAD understands that the purpose of proposed §2510.3-5(d)(4) is to prevent discrimination among the members. However, the ACA already contains cost limitations on workers by providing a cap on the amount of family income that must be used for annual health premiums. In addition, for self-funded plans, including Association plans, the long-standing rules of Internal Revenue Code Section 105(h) and HIPAA prohibit various forms of discrimination in favor of highly paid participants and discrimination against employees and dependents based on health status. This additional layer would not only disrupt and place the reserves of existing AHPs in financial jeopardy, it will make the rest of this proposed regulation unworkable and of little value to associations wanting to establish a pooled plan for their members unless eliminated from the final rule.

Additionally, CUAD acknowledges that the Department has stated in the preamble to the final rule, "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…In particular, health insurance coverage sold to, or through, associations that do not sponsor their own separate ERISA-covered employee benefit plans would not need to alter their operations if the proposed rule becomes final. Rather than constricting the offering of such non-plan multiple employer welfare arrangements (MEWAs), the proposed rule would simply make more widely available another vehicle —the AHP— for the employer associations to provide group health coverage to their employer members, thus making available advantages distinct from non-plan MEWAs, including, often, access to the large group market. *83 FR 616*

However, in order for the final rule to accomplish its overall objective of reducing regulatory constraints on AHPs and to support an expanded role for AHPs in the marketplace, proposed §2510.3-5(d)(4) should be eliminated from the final rule. Adopting proposed §2510.3-5(d)(4) would function as a new regulatory constraint for AHPs and would be contradictory to the Department's and President Trump's Executive Order objectives of reducing regulatory burden and providing additional healthcare options in the marketplace. The reason that this negative provision would be so detrimental to AHPs is that AHP's track records of successes have been based on combining volume to reduce overall administrative costs for all participants, while risk-rating the individual groups within AHPs based on health claims experience and other factors. This negative provision would pose a new regulatory constraint by no longer allowing individual groups within AHPs to be risk-rated on their own health claims experience. If AHPs cannot fairly risk-rate individual groups, then those groups with lower health claims experience will be recruited to

leave the AHP by insurance carriers and the remaining higher risk groups will cause the AHP to escalate the increase in premiums, causing the pool to be unsustainable.

We thank the Department for its willingness to support AHPs and provide additional regulatory flexibility to expand access to affordable healthcare insurance options. AHPs are an innovative option for expanding access to employer sponsored coverage, especially for small credit unions, and CUAD fully supports the expansion of healthcare options through AHPs and the Department's proposed rule with the exception of proposed §2510.3-5(d)(4). CUAD implores the Department to reject proposed §2510.3-5(d)(4) as it will negatively impact AHPs and will reduce their viability in the marketplace.

Thank you for this opportunity to share our comments.

Respectfully,

Jeffrey Olson
CEO/President

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Chief Compliance Officer