NAHB
National Association of Home Builders

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

Attention: Definition of Employer – Small Business Health Plans RIN 1210-AB85.

To Whom It May Concern:

On behalf of the National Association of Homebuilders ("NAHB") and its membership, I am pleased to submit comments in response to proposed rules issued by the Department of Labor (the "Department") that would broaden the criteria under Section 3(5) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") for determining when employers and individuals may join together to form a group or association treated as the sponsor of a single large group health plan (the "Proposed Rules").

Overview of NAHB

Since it was founded in the early 1940s, NAHB has worked to ensure that housing is a national priority and that all Americans have access to safe, decent and affordable housing. NAHB represents the largest network of craftsmen, innovators and problem solvers dedicated to building and enriching communities. Each year, NAHB's members construct about 80% of the new homes built in the United States, both single-family and multifamily. Comprised of a federation of more than 700 state and local builders' associations, NAHB represents more than 140,000 members. About one-third of NAHB's members are home builders and remodelers and the remaining members work in closely related specialties, such as, sales and marketing, housing finance, building trades and manufacturing and supply of building materials. We are dedicated to providing education and tools to our members, servicing their business needs and assisting them in navigating today's complex political and economic issues.

NAHB commends the Department on issuing the Proposed Rules to better enable associations to provide affordable quality health benefits to their members and to provide a regulatory framework for treating health plans sponsored by associations ("Association Health Plans" or "AHPs") as large group health coverage for purposes of federal and state health care laws. We believe that associations, such as NAHB, are uniquely suited to provide comprehensive, affordable health care for their members through a single large group health plan by leveraging economies of scale and administrative efficiency. We recognize that the Proposed Rules chart new territory for group health plans sponsored by associations and appreciate the opportunity to submit the following comments on the Proposed Rules.

Definition of Bona Fide Association (§2510.3-5(b)(1))

While NAHB supports the expansion of the definition of "employer" for purposes of Section 3(5) of ERISA, we are concerned that permitting an entity to form an association solely for the purpose of providing health benefits without any nexus or tie to an existing, legitimate association is problematic and subject to abuse.

We recommend that only a legitimate established organization, or a trust or other entity affiliated with such an organization, be permitted to sponsor an AHP and that the organization affiliated with or sponsoring the AHP have a legitimate business purpose separate and apart from the establishment of a health plan for its members. To that end, we recommend that the criteria to be a "bona fide association" be revised to require that the association be (i) organized under the laws of a state, (ii) recognized as a not-for-profit corporation with exemption from federal taxation; and (iii) established and operated for at least two years prior to the date the AHP is established. In addition, we recommend that the final rule be clarified to permit an association (as defined above), or multiple affiliated associations in the same industry, to join together to establish a trust or other legal entity for purposes of sponsoring an AHP. This clarification will ensure that AHPs are sponsored and administered by bona fide associations, or joint entities or trusts established by or affiliated with bona fide associations, and will protect consumers from commercial arrangements that are established solely for financial gain without any other connection to the members.

Further, the Proposed Rules make an assumption that the members of an association are either employers of common law employees or working owners with dual employer/employee status. We would like to highlight the fact that not all association membership consists solely of employer groups and working owners. In fact, membership in an association is often comprised of individuals who may be common law employees of employers that are not also members of the association. For example, membership in the NAHB consists of individuals who are members of their local affiliated building association (which can either be an employer or individual membership), sole proprietors working in the industry who meet membership criteria and students or apprentices sponsored by a member. Other associations where this membership structure is prevalent include professional associations, such as the American Bar Association. We encourage the Department to clarify that members of an association may participate in an AHP sponsored by that association even if their common law employer is not also a member of the association.

Commonality of Interest Test (§2510.3-5(c))

NAHB supports the first prong for satisfying the "commonality of interest" test set forth in §2510.3-5(c)(1) of the Proposed Rules, namely that the employers be in the same trade, industry, line of business or profession, regardless of geographic location. However, we have concerns about the second prong of the commonality of interest test set forth in §2510.3-5(c)(2) of the Proposed Rules that would permit single large group health plans to be established by regional associations without any common ties by trade, industry or profession. We believe the second prong of the commonality of interest test facilitates the establishment of commercial arrangements with no connection or ties to underlying participants (other than geography) and could result in an increase in sham arrangements that are susceptible to financial mismanagement and insolvency – arrangements which the existing MEWA rules are meant to discourage.

With regard to the meaning of the terms "trade", "industry" or "line of business", NAHB encourages the regulators to interpret these terms broadly to encompass related trades in the same industry. For example, while all NAHB members must serve the home building, multi-family development and remodeling industry, in

addition to builders and developers, members also include a wide variety of professionals, artisans and tradespeople, such as plumbers and electricians, who support the home building and development industry. In short, all members of a legitimate association (and their families) should be permitted to participate in an AHP sponsored by or affiliated with the association, provided they otherwise meet the criteria for membership. For this reason, we agree that it is important to maintain the organizational structure, participation, governance and functional control requirements of the Proposed Rules.

Expansion of AHP coverage to Working Owners and Definition of Working Owner (§2510.3-5(e)(1) and (2))

NAHB strongly supports the expansion of coverage under an AHP to "working owners", but has concerns about the way in which the term "working owner" is defined in the Proposed Rules. First, we recommend that the definition of "working owner" in §2510.3-5(e)(2) be modified to eliminate the requirement in subparagraph (iii) that the individual must not be eligible for other subsidized group health plan coverage under a group health plan sponsored by any other employer of the individual or the spouse's employer. This requirement unfairly disadvantages working owners and their spouses who have access to other employer sponsored health care and would also be administratively cumbersome for AHPs to monitor. Further, coverage through a spouse's or other employer's health plan may not be the most affordable or appropriate option for a working owner and his or her family and may cause undue hardship to an individual who is precluded from electing preferable AHP coverage on this basis.

In addition, we believe the hours requirement for purposes of meeting the definition of "working owner" in §2510.3-5(e)(iv)(A) should be modified to enable interns and apprentices of trades, such as the building trades, to qualify for health coverage under an AHP sponsored by an association of which they are members. Participation criteria could be based on hours worked performing services for a trade even if such individuals are not working a full-time schedule or paid for their work. Apprenticeship and internship programs are extremely common in many industries, including the building industry, and offer a career path to many individuals who choose not to attend a four-year college or university.

We do, however, support the provision in the Proposed Rules that would permit a group or association sponsoring an AHP to reasonably rely on a written representation from an individual that he or she meets the eligibility criteria for participation in the AHP as a working owner. A written representation will greatly relieve the administrative burden on the plan sponsor to request proof and verify eligibility and is consistent with other forms of written representations used in concert with group health plan administration.

Clarify that Participation in AHP is not a Basis for finding Joint Employment Status under other Federal and State laws

We believe it is important for the Department to add a safe harbor to the regulation to clarify that an employer's participation in an AHP with other unrelated employers may not be used as indicia of joint employment status for purposes of other sections of ERISA, such as Section 510 of ERISA, or other federal and state labor laws, or common law. The independent nature of small businesses and working owners should be preserved. The final rules should also clarify that the sponsor of the AHP cannot be sued as an "employer" under Section 510 of ERISA and should be treated as an "employer" solely for purposes of Section 3(5) of ERISA to enable an AHP to be treated as a large group health plan.

ERISA Preemption

NAHB supports broad ERISA preemption of state insurance laws as they may apply to AHPs. Subjecting AHPs to myriad state insurance laws will significantly hamper their adoption by legitimate associations. We believe that the organizational structure, participation and governance requirements applicable to AHPs under the Proposed Rules, in connection with the additional requirements for sponsorship by, or affiliation with, bona fide associations or groups of associations discussed in these comments, will put AHPs on the same strong structural and financial footing as single employer plans which enjoy broad ERISA preemption.

AHPS are already subject to sufficient federal and state regulatory oversight without additional regulation specifically aimed at multiple employer welfare arrangements, or MEWAs. Associations that are exempt from federal tax are required to file Form 990 with the Internal Revenue Service and are subject to audit. Associations are also accountable to their dues-paying members and governing boards and may also be subject to additional state laws and reporting requirements under state laws that govern not-for-profit or charitable organizations. Insurers that issue group health insurance policies to AHPs are subject to licensing, reserve requirements and regulation under federal and state law, and group health insurance policies issued to AHPs must comply with state mandated benefit requirements and be filed with the department of insurance in the state where the policy is delivered and/or situsted. In addition, fully-insured and self-insured MEWAs are subject to federal reporting on the Department's Form M-1 and Form 5500 (with related financial schedules for AHPs funded through trusts) and are also subject to oversight, audit and enforcement by the Department under laws applicable to MEWAs, recently strengthened under the Affordable Care Act.

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In conclusion, we support the Department's effort to expand the sponsorship of single employer large group health plans to legitimate associations for the benefit of their members and members' families and support affording such plans broad ERISA preemption from state insurance laws. We believe that AHPs, if properly structured, will result in lower costs and provide greater access to comprehensive health care for small employers and individuals through membership in an association.

Respectfully submitted,

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