February 23, 2018

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

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

To Whom It May Concern:

Thank you for the opportunity to comment on U.S. Department of Labor's (DOL) proposed regulation ("Proposed Rule" - RIN 1210-AB85) under Title I of the Employee Retirement Income Security Act (ERISA) that would broaden the criteria under ERISA section 3(5) for determining when employers may join together to form Association Health Plans (AHP).

I have been involved with an Association Health Plan as a participant and Trustee. I am **writing to <u>support</u> the Proposed Rule,** however, there are several provisions that work against the stated goal of AHP expansion and require amendment.

I. <u>Commonality of Interests:</u>

Specifically, we have concerns regarding the expanded definition of "commonality of interests" pursuant to ERISA section 3(5). As it pertains to associations "created solely for the purposes of providing group health coverage", we feel ERISA section 3(5) should not be changed and that only bona fide associations should be able to sponsor AHPs. Though we understand the DOL's motivation to extend the definition such that employers in areas not represented by adequate bona fide associations might have the opportunity to bind together and form their own, we feel strongly that the potential negative outcomes of this scenario far outweigh any potential benefits.

Firstly, we feel that there is almost certainly adequate bona fide association across most of the nation, and certainly within the state of Washington. Thus, the percentage of the population that might exist in absence of bona fide associations, that might benefit from such a definition change, is almost certainly a small minority, if any. Conversely, the number of businesses and bona fide associations that might experience a negative consequence to this change in definition could nearly be ubiquitous. In this regard, the risk clearly outweighs the potential reward.

Secondly, we feel that allowing for the creation of artificial associations would unduly segment, and possibly fracture, a region into a multitude of smaller AHP's, compromising each AHP's ability to enroll the critical masses needed to leverage the Law of Large Numbers, essential for the viability and long-term sustainability of any pooled-risk insurance

endeavor, as well as various other economies of scale, such as a larger AHPs ability to better leverage its membership to negotiate provider discounts, etc. Though we feel there should be a healthy number of AHP's in any given marketplace to drive competition, we feel strongly that there are ample bona fide trade associations, as well as local, regional and state chambers of commerce to foster a competitive marketplace.

Lastly, historically, Multiple Employer Welfare Arrangements (MEWAs) under ERISA have had a bad reputation of financial mismanagement often leading to financial instability and ultimate insolubility. We feel it is critical that AHPs be sponsored only by reputable, bona fide associations, such as chambers of commerce, to foster the sense of trustworthiness and validity of AHPs as a safe, reliability, cost-effective alternative for employers. It is our position that allowing AHPs to be sponsored by Artificial Associations furthers the potential for less qualified, less scrupulous entities to enter the AHP space, potentially resulting in the creation of unsustainable AHPs, further harm to the perception of MEWAs/AHPs, all stymieing the AHP industry's ability to bring health care savings to millions of small businesses. Below are the minimum requirements we suggest be included in the final rule:

(1) Organization has been operating for more than five years;

(2) Organization has a federal tax exemption as a non-profit organization; and,

(3) Organization is comprised of members who share a commonality such as industry or geographic region.

II. Expansion of the HIPAA Nondiscrimination Rules

Precluding AHPs from continuing to use claims experience to set rates at the employer group level will inherently result in cross-subsidization and discourage the use and expansion of AHPs. The result would be that many employers' rates would increase simply as a result of one or two high-cost employers within the AHP. It creates adverse selection, cripples the expansion of AHPs, creates unhealthy community rated/individual markets, and will work against the goal of providing affordability through AHPs. Precluding AHPs from rate-setting at the employer group level in order to distinguish AHPs from commercial insurance is like asking credit unions to distinguish themselves from commercial banks by not checking a company's credit-worthiness when issuing a loan. It is simply untenable.

The Department's goal of distinguishing AHPs from commercial insurance is positive, but it is not achieved through expanding the HIPAA nondiscrimination rules. The appropriate way to distinguish AHPs from commercial insurance is through the provisions relating to establishment and control of the AHP.

Another way to distinguish AHPs from commercial insurance, while minimizing the Proposed Rule's impact on existing AHPs, would be to modify the nondiscrimination requirement to

permit AHPs currently in existence to continue operating as they have. Specifically, DOL should adopt a grandfathering rule pursuant to which fully-insured AHPs in existence prior to January 5, 2018 (publication date of the Proposed Rule) would be subject to the nondiscrimination requirements in section 2510.3-5(d) without regard to paragraph (d)(4). Grandfathered AHPs do not implicate the concerns that the Department has raised about risk selection because such AHPs have operated to enhance healthcare marketplaces prior to the issuance of the Proposed Rule. This modification would permit grandfathered AHPs to continue their current practice of experience rating each employer member, while balancing the Department's concerns about risk selection.

III. Essential Benefits

The Proposed Rule eliminates the requirement that coverage provided through AHPs provide essential benefits. This change is detrimental because it will result in only healthy populations drawing towards AHPs and it will provide unhealthy adverse selection in individual markets.

IV. Coverage Across State Lines

The Proposed Rule fails to specify which state laws can still be enforced, including for example, laws relating to rating practices or qualifications of AHP sponsoring entities. Historically, state insurance regulators have had the authority to review and approve insurance products offered to residents and businesses in their states. It is essential that the Proposed Rule expressly states that each state maintains the ability to protect their health insurance purchasers by regulating the insurance market within the state.

The Proposed Rule should make explicit that all AHPs must comply with the state law in which coverage is provided.

V. Clarify Expansion of Coverage for Sole Proprietors

The Proposed Rule, through the rule's language and its examples, suggests that AHPs may, but do not have to, cover sole proprietors, regardless of whether a sponsoring association includes sole proprietors as members. However, some commentators have questioned whether the Proposed Rule retains this flexibility. The Department should clarify that AHPs do not have to offer coverage to sole proprietors regardless of whether a sponsoring association includes sole proprietors. More broadly, AHPs should retain the right to set rules as to what membership requirements are (including company size and/or structure), as long as the AHP otherwise satisfies the requirements, including nondiscrimination requirements, of the Proposed Rule. For example, a maritime industry association could offer an AHP limited to the salmon fisheries industry.

The Proposed Rule creates a real and unique health care cost-containment opportunity for sole proprietors and small employers alike. However, for the reasons stated above, we

believe that changes must be incorporated into the final rule in order to allow for these opportunities to come to fruition.

Sincerely,

Jane Billbe