March 5, 2018

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

Submitted Electronically: Email to e-ORI@dol.gov and via Regulations.gov

RE: Proposed Comments Request for the Definition of "Employer" under Section 3(5) of ERISA - Association Health Plans RIN 1210-AB85

Dear Mr. Secretary:

The Construction Industry of Kansas Health Trust is responding to your request for comments on the proposed rule published in the Federal Register on January 5, 2018, titled, "Definition of 'Employer' under Section 3(5) of ERISA – Association Health Plans."

The Construction Industry of Kansas Association Trust (CIK) was established in 1972 for the employers within the engineering, architecture and construction-related industry in Kansas. The two Associations participating in the Trust are the Associated General Contractors of Kansas and Kansas Contractors Associations. The trust is tax exempt under the provisions of Section 501(c)(9) of the Internal Revenue Code. The trust provides health, dental, vision, life and disability benefits to approximately 60 employers with 3,500 participants. The trust is filed as a group insurance arrangement as currently defined by the Department of Labor (Department) and all benefits provided by the trust are fully insured through various contracts issued by insurance companies. We are pleased to offer these comments for consideration, which draw on insights and feedback from the plan trustees, plan participants and administrators of our existing and very successful association health plan (AHP).

The focus of the proposed rule is to give groups of employers the ability to start new AHPs. It does not address the current AHPs that have been existence for many years like the CIK. Our primary concern with the proposed regulation is with the **nondiscrimination** provisions. If it is finalized as proposed, the new rules will be so disruptive to the current business practices of existing AHPs, plans like the CIK will in all likelihood cease to exist.

Since the Department specifically solicited comments on the nondiscrimination requirements in the preamble to the proposed rule, including how they balance risk

selection issues with the stability of the AHP market and the ability of employers to innovate and enter voluntary coverage arrangements, the CIK assumes it is not the Department's intention to damage the existing AHP market space and the positive insurance coverage arrangements that hundreds of thousands of American small businesses and their millions of employees and dependents are already enjoying through existing AHP arrangements. So to preserve the existing AHP market, and allow the CIK and other organizations like ours to continue to provide coverage, it is imperative that the Department makes adjustments to the nondiscrimination section of the proposed rule.

History and Background

The CIK has been providing benefits to its participants for over forty-six years. Average rate increases have been in the single digits for most of those years, allowing for a stable and sustainable program. The CIK has also been able to offer wellness and telemedicine programs free of charge to its members through prudent fund management. The CIK current premium rating structure uses factors of age, location, industry code, plan product and **medical risk**. The medical risk factor is determined by our health insurance carrier, BCBS of Kansas, and is based on historical claims data through medical underwriting. The trust is operated under state regulations that limit the range of medical risk factors with a floor and ceiling and limits on the annual change that can be made to a risk factor. These limits keep large increases or decreases in check over annual renewals but also allow high utilizing groups year over year to be rated up to contribute at a level commensurate with their utilization.

Based on the CIK's history and experience managing an AHP, a key component of balancing risk and creating a stable and sustainable plan is directly related to the ability to assign appropriate premium contribution levels to each group. The medical underwriting available to the plan keeps the trust viable.

Proposed Immediate Application to Existing AHPs

The *probable outcome of proposed rules on existing AHPs that medically underwrite will be catastrophic.* The CIK's participating employer groups that currently receive lower risk factors and who are lower utilizing employers will immediately receive up to 112% increase in premium upon their next renewal. These groups will have no choice but to seek insurance outside of the trust. Groups that currently receive higher risk factors because they are higher utilizers will receive a decrease in premium upon renewal. While this appears to be advantageous, those groups will contribute less premium in the year of implementation and the trust as a whole will not collect enough premium to cover claims. The carrier will need to rate the next renewal to bring in enough premium which will create large renewals in year two for all plan participants. The remaining groups left in the trust will also leave. Some in the industry call this a death spiral.

Wellness Activity Impact

Another negative impact of the proposed nondiscrimination requirements would be the inability to reward an employer group that implements a wellness program to promote healthy activities and drive positive health outcomes. This consequence of the non-discrimination rule is counterproductive and intuitively inconsistent with the intent of the expanded access to care through AHPs.

Proposed Changes To The Rule To Support Existing AHPs

When the ACA was first enacted, existing health insurance markets were given over three years to transition to new premium rating and nondiscrimination requirements. Additionally, individuals and employers were able to access the "grandfathered" plan clause of the ACA so that they could maintain existing plan options that were meeting their needs. When it was revealed that as a consequence of the ACA many Americans and small employers were not actually able to keep "grandfathered" plans, the previous Administration allowed for "grandmothered" plan options to continue if states wished, so that employers could maintain old plan options that they liked and were affordable for them and their group beneficiaries. Many Americans still maintain both grandfathered and grandmothered plan options today, but under this proposed rule, current AHP participants would not have a similar option.

***Remove nondiscrimination language at the employer level*:** To avoid disruption of existing AHPs and their employer participants, the CIK respectfully requests that the final rule allow AHPs to enforce nondiscrimination rules only at the employer level, not at the association level.

Allow State Waiver for existing AHPs: If the nondiscrimination rule as written is included in any final regulation, we would urge the Department to require states to allow AHPs to seek state-level waivers to continue to utilize health status rating factors, as allowed by existing state law. This would give state departments of insurance the ability to review an AHP's premium rating practices and approve a waiver of continued existing practice for AHPs either on a grandfathered basis or another form of state review and approval process.

Provide a Transition Period: If the non-discrimination provisions are included in the final rules and a state waiver is not agreed upon, we would finally suggest existing AHPs be allowed an implementation window over at least five years to allow them to phase out the medical underwriting without immediately dismantling and disrupting their current situations.

In summary, we believe there is an unintended consequence of the proposed rule, and if it is finalized without adjustment, our existing AHP and hundreds of others like it will be grievously harmed. If the intent of the proposed rule is to open up markets and promote association health plans, it will miss the mark and actually destabilize the market in place today. The CIK would support the finalization of an AHP rule that allowed us to build upon

our thriving health insurance coverage arrangement and expand it to help even more business owners. We hope that in providing these comments, we have provided you with a path to allow for, and encourage that outcome.

The CIK sincerely appreciates the opportunity to provide comments on this proposed rule. If you have any questions about how the current AHP marketplace is serving employers, employees and dependents today, or how we believe the current proposal could shatter our existing and well-functioning AHP rather than improve our operations, please do not hesitate to contact us at our Administrator at either (859)226-1767 and / or Administrativeservicesgroup@umr.com.

Sincerely,

Construction Industry of Kansas Health Trust Participating Employer Committee