March 6, 2018

The Honorable Preston Rutledge
Assistant Secretary of Labor
Employee Benefits Security Administration Office of Regulations and Interpretations
Room N–5655
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Submitted via the Federal Regulations Web Portal, http://www.regulations.gov

RE: Definition of 'Employer' under Section 3(5) of ERISA—Association Health Plans (RIN 1210–AB85)

Dear Assistant Secretary Rutledge:

On behalf of Blue Cross Blue Shield of Massachusetts ("BCBSMA"), we appreciate the opportunity to provide comments to the Proposed Rule: "Definition of 'Employer' under Section 3(5) of ERISA—Association Health Plans," as issued in the Federal Register on January 5, 2018 (83 Fed.Reg. 614; Proposed Rule).

BCBSMA is one of 36 locally based, community operated Blue Cross and Blue Shield Plans that collectively provide health benefits to nearly 98 million Americans and contract with hospitals and physicians in every U.S. zip code. At Blue Cross Blue Shield of Massachusetts, our highest priority is to make quality health care affordable for individuals, families and employers who have made us the health plan of choice in Massachusetts. Our promise and vision guide our efforts to create greater value for our members and employers. Founded in 1937 by a group of community-minded business leaders, BCBSMA is the leading private health plan in the Commonwealth—a not-for-profit company with a proud history of community and health care leadership.

Although BCBSMA shares the goal of the Proposed Rule to "expand access to affordable health coverage, especially among small employers and self-employed individuals", we believe that the policies, if implemented as we understand them to be proposed, will lead to significant market instability, decreased access and increased costs for older and less healthy workers and the increased likelihood of fraud.

Allowing Associations to Form Solely to Provide Health Care Coverage or Based on Geography Will Have Serious Consequences on the Massachusetts Market.

The twin provisions contained in the Proposed Rule of redefining a bona fide association to allow "employers to band together for the single purpose of obtaining health coverage" as well as allowing formation of an association based on "common geography" fundamentally change the basis on which types of associations could come into existence. While simplistic and straightforward in its statement and sentiment, this radical shift could have some serious consequences on the individual and small group markets in Massachusetts and across the nation.

There are currently well-established associations providing health care coverage options to employer groups throughout the country. Many of these legitimate associations have a history with their membership and a strong background in serving their members on a multitude of issues, including health care. By virtue of these and other qualities, the potential for fraud is mitigated. Likewise, the interest in providing for the full membership diminishes the potential for segmenting risk based on health or age.

Prior to the ACA, there were numerous examples of fraudulent associations operating throughout the country. The failure of these associations as they became insolvent or shut down resulted in hundreds of thousands of people being left without insurance and hundreds of millions of unpaid claims which is well-detailed in Congressional Research Service and GAO reports as well as filings by the Department of Labor itself. The painful lessons learned from these collective experiences are that bad actors have and will continue to enter markets where the market and regulatory structure allow. Moreover, without a motivation to exist and affiliate beyond that of the provision of insurance, the potential for fraud is high and the likelihood of acting in the best interest of full association membership is low.

BCBSMA is also concerned about the impact that formation of these new associations may have to the existing individual and small group markets in Massachusetts. After implementing both Massachusetts health care reform and the ACA, the Massachusetts merged market has stabilized with almost 98% insured by multiple health insurance carriers throughout the state. Introduction of these new AHPs will have the unfortunate, yet predictable, effect of destabilizing the market. The relaxation of the standards under which AHPs may be formed are likely to fragment the market. Whether through marketing, product design, rating or pricing, as proposed, the rules would encourage associations – who likely have no reason to exist except for the provision of insurance – to target and attract younger and healthier individuals and small groups. The existing state merged market would become increasingly unstable as higher cost individuals and groups would likely remain. This will drive up the premiums for small employers, especially those with older workers or those that operate in high cost industries. Respected entities, including the American Academy of Actuaries, Oliver Wyman, Milliman and Avalere have all reached the same conclusion after performing significant modeling and quantitative analysis.

State Authority to Regulate AHPs and Regulate Insurance Coverage Should be Maintained

To the extent that the Proposed Rule is ambiguous, we respectfully request that the Department clarify that states may continue to regulate AHPs, including those that are self-funded, to ensure market stability and prevent fraud. States should also maintain their ability to regulate insurance coverage sold to AHPs, should they choose to do so, whether this includes applying their own mandates requiring comprehensive consumer protections or those items consistent with their long-standing regulatory purview. This is settled law and should be affirmed in the Final Rule. Certainly, should the Administration move forward with a policy contrary decades of legal and administrative rulings in this regard would be upset, including a case that focused on Massachusetts. Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985) (holding that a Massachusetts statute setting forth mandatory minimum health care benefits for inclusion in general insurance policies was "saved" from preemption, because "regulation regarding the substantive terms of insurance contracts falls squarely within the saving clause…."). An association formed in another state, by virtue of its insurance rules or coverage requirements, should not be able to undermine the Massachusetts market. We do not believe that the Department would want this disruption to occur in any state either directly or indirectly and urge the Department to strengthen the provisions protecting state authority.

Thank you for the opportunity for BCBSMA to provide its recommendations and insight on this important Proposed Rule. If you have any questions or would like further information, please contact Deirdre Savage at 617-246-3359 or at deirdre.savage@bcbsma.com.

Sincerely,

Deirdre W. Savage
Vice President
Blue Cross Blue Shield of Massachusetts