



**NORTH CAROLINA  
FARM BUREAU FEDERATION, INC.**

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March 6, 2018

Ms. Janet K. Song  
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

Dear Ms. Song:

On behalf of North Carolina Farm Bureau (NCFB) and the thousands of North Carolina farm families it represents, I want to thank you for the Department's proposed regulation relating to association health plans. NCFB applauds the Department's work to enhance the ability of small business owners, including farmers, to join together to provide health coverage to their employees, and we appreciate the opportunity to provide comments on this important matter.

NCFB is a 501(c)(5) organization that was founded in 1936 to advocate for the public policy interests of North Carolina's farm families at the federal, state, and local levels of government. From 2016 to 2018, North Carolinians, including thousands of farm families, who purchase health insurance in the individual market and are ineligible for health insurance subsidies have seen their health insurance premiums increase substantially year over year. In fact, in 2016 their premiums increased by 34.5% to be followed by increases of 24.3% in 2017 and 14.1% in 2018. Without a doubt, these increases have inflicted serious financial strain on businesses across North Carolina. In the farm sector, the negative impact has been even more pronounced because of low commodity prices and the tightness of credit markets. For farmers who recently had their grandfathered health insurance plans terminated by Blue Cross Blue Shield of North Carolina, these costs increases hit all at once. These cost increases are unsustainable and constitute a threat to North Carolina's agricultural economy, which is the State's number one industry.

In an attempt to help stabilize these increasing health insurance costs, NCFB is establishing a self-insured group health plan for its farmer members and the businesses that serve them. Several organizational factors make it possible for NCFB to establish the plan, including its strong financial standing, well-respected brand, and large employee base. To the extent NCFB's plan will be classified as an employee welfare benefit plan under ERISA, the proposed regulation will make it easier for NCFB to provide coverage options to thousands of North Carolina small employers and self-employed individuals.

*Farm Bureau and Agriculture...  
We keep North Carolina growing!*

The first section of these comments discusses NCFB's support for the Department's proposed commonality of interest definition, *see* para. (c), and its working owner provisions, *see* para. (e). In the second section, NCFB offers some suggestions to improve the proposed regulation.

## **NCFB Applauds the Department's Proposed Regulation**

### 1. Commonality of Interest

First, NCFB welcomes the Department's proposal to broaden the commonality of interest requirement. *See* paras. (b)(5), (c). The requirement would retain the ability of associations or groups made up of "[e]mployers being in the same trade, industry, line of business or profession" to form association health plans. As noted above, NCFB is establishing a group health plan under current law to help its farmer members and the businesses that service them to provide health coverage to their employees. However, the proposal would also enable organizations like NCFB to include "[e]mployers having a principal place of business in a region that does not exceed the boundaries of the same State or the same metropolitan area." In addition to its approximately 35,000 farmer members, NCFB's membership includes thousands of non-farmers who own small businesses and are also struggling with increasing health insurance costs. Allowing these non-farmer employers to join a NCFB-sponsored plan will help realize the Department's goal to "expand employer and employee access to more affordable, high-quality coverage." 83 Fed. Reg. 614, 616 (Jan. 5, 2018). Further, expanding the pool of eligible participants would provide the plan with increased bargaining power.

### 2. Working Owners

Second, NCFB strongly supports the proposed regulation's working owner provision. As set out in paragraph (e), this provision would treat sole proprietors and self-employed individuals as employers for purposes of participating in a group health plan and as employees for purposes of being covered under such a plan. Providing this dual status to sole proprietors and self-employed individuals could have a significant impact on North Carolina's small business owners and farm families in particular. According to the 2012 U.S. Census of Agriculture, there were 50,218 farms located in North Carolina. The vast majority of these farms—43,563 to be exact—are operated by sole proprietors. In addition, 3,132 North Carolina farms are organized as partnerships. Through its working owner provision, the proposed rule would allow these farmers to obtain access to more affordable health coverage.<sup>1</sup> As such, this may be the most significant feature of the proposed rule.

## **NCFB Suggestions for Improving the Regulation**

Notwithstanding NCFB's support for the proposed rule, some of its provisions can be improved. In particular there are three provisions worthy of the Department's attention.

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<sup>1</sup> Of course, not all of these sole proprietors and self-employed farmers would be eligible to participate in an association health plan established under the proposed rule because of the limitations stated in paragraphs (e)(2)(iii) and (iv).

### 1. Bona fide group or association requirements

First, the group requirements set out in paragraph (b) should be revised to include an additional provision requiring the group to be sponsored by an organization that has been in existence for a defined period of time. For example, for a multiple employer welfare arrangement to be licensed under North Carolina law, the entity must be “[e]stablished by a trade association, industry association, or professional association of employers or professionals that has a constitution or bylaws and that has been organized and maintained in good faith *for a continuous period of five years* for purposes other than that of obtaining or providing insurance.” N.C.G.S. § 58-49-40(a)(2) (emphasis added); *see also* 42 U.S.C. § 300gg-91(d)(3) (defining the term “bona fide association” as an association that, among other things, “has been actively in existence for at least 5 years”). Adding a similar requirement to the proposed regulation may help ensure that an entity sponsoring an association health plan is, as stated in the proposed rule, a “genuine organization with the organizational structure necessary to ‘act in the interest’ of participating employers.” *See* 83 Fed. Reg. at 620. Further, this additional requirement will support the Department’s stated goal “to prevent formation of commercial enterprises that claim to be AHPs but, in reality, merely operate” commercial insurance programs. *Id.*

### 2. Non-discrimination

Second, the Department should remove paragraph (d)(4) from the proposed regulation’s non-discrimination provisions. This requirement would limit the ability of employers to fully manage the risks they undertake as members of an association health plan, thus undermining one of the purposes for establishing such a plan in the first place. If paragraph (d)(4) remains in place, there would be little incentive for employers to join association health plans because the cost of coverage under such a plan would likely be similar to the high cost of coverage currently available in the individual health insurance market. In NCFB’s view, few farm employers would be willing to join a health plan that does not provide a meaningful benefit at an affordable cost. Unfortunately, they would likely be better off with the unsustainable status quo.

With respect to the Department’s request for comment regarding whether paragraph (d)(4) is “an appropriate or sufficient response to the need to distinguish AHPs from commercial insurance,” *see* p. 40, NCFB believes the paragraph is overkill in light of the substantial and reasonable group requirements set out in paragraph (b). To the extent it is necessary, the Department can further distinguish association health plans from commercial insurance by strengthening the group requirements with a provision requiring organizations sponsoring association health plans to have been in existence for a defined period of time, as suggested above. To this point, association health plans established by long-standing organizations that demonstrate “a bona fide employment nexus” among employers are not likely to be operating as mere commercial enterprises. *See id.* at 623. The requirements listed in paragraph (b) are important safeguards against the Department’s concerns about association health plans becoming vehicles for mere commercial insurance products. In light of these protections, retaining paragraph (d)(4) has the potential to severely “hamper employers’ ability to create

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flexible and affordable coverage options for their employees.” *Id.* at 624. Accordingly, failure to remove paragraph (b)(4) would constitute a lost opportunity for North Carolina’s small business owners and farm families.

Further, it is unclear from the proposed regulation whether paragraph (d)(4) would apply to plans that have already been established by organizations that have demonstrated an “bona fide employment nexus.” *See* 83 Fed. Reg. at 623. If the Department elects not to remove paragraph (d)(4) from the final rule, NCFB requests the Department clarify that paragraph (d)(4) does not apply to plans that were established prior to its final publication.

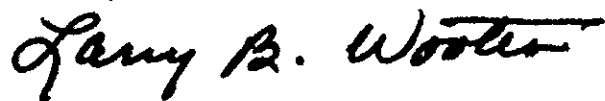
### 3. Harmonize proposed regulation with VEBA regulations

Finally, if the Department promulgates a final rule that includes the commonality of interest concept set out in paragraph (c) and the working owner concept described in paragraph (e), NCFB encourages the Department to work with the Internal Revenue Service (IRS) to harmonize the final rule with the regulations governing voluntary employees’ beneficiary associations (VEBA). *See* 26 C.F.R. § 1.501(c)(9)-2. As the Department knows, VEBA trusts are a common means of funding association health plans. In fact, North Carolina law requires that association health plans be non-profit organizations. N.C.G.S. § 58-49-40(a)(1), (3). If the VEBA regulations are not revised to reflect the content of the proposed rule, it could frustrate the efforts of employers to form association health plans.

Two provisions in the VEBA regulations require specific attention. First, the “employment-related common bond” standard articulated in 26 C.F.R. § 1.501(c)(9)-2(a)(1) appears to be inconsistent with the broad commonality of interest provision set out in paragraph (c)(2) of the proposed rule. Second, the 90%-employee-test, *see* 26 C.F.R. § 1.501(c)(9)-2(a)(1), restricts the number of non-employees who may participate in a VEBA trust. On its face, the test may be in tension with the working owner concept the Department proposes in paragraph (e). In light of this potential conflict, the Department should work with the IRS to determine whether the working owner concept needs to be incorporated into the text of § 1.501(c)(9)-2(a)(1). The failure to consider these issues could limit the adoption of association health plans that utilize VEBA trusts as financing tools.

Thank you again for the opportunity to comment on the Department’s proposed regulation. Please do not hesitate to contact me if you have questions about these comments or NCFB’s interest in this important matter.

Sincerely,

A handwritten signature in black ink that reads "Larry B. Wooten". The signature is written in a cursive, flowing style.

Larry B. Wooten  
President