[redacted]

October 10, 2018

Mr. Michael Marquis
Freedom of Information Officer
U.S. Department of Health and Human Services
Hubert H. Humphrey Building, Room 729H
200 Independence Avenue, SW
Washington, D.C. 20201

Also by e-mail to FOIARequest@hhs.gov

Dear Mr. Marquis,

I write to request records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, that are generally related to the question of use of §3(5) of the ERISA (defined below) to determine the legally effective number of employees of an employer, and in turn whether an employer is small or large for various legal purposes within the purview of HHS. This letter describes: (1) the records requested and (2) my request for a fee waiver for production of these records.

This request seeks all records, as described below, as that term has been defined by FOIA and interpreted by the courts (e.g., 5 U.S.C. § 552(f)(2)), including those in paper form or electronic form including e-mails and text messages.

"You" and "your" as used in this request means the U.S. Department of Health and Human Services, and its component or sub-agency the Centers for Medicare & Medicaid Services (CMS), and all other sub-agencies of HHS and all respective subdivisions of each sub-agency. CMS is a particular focus in this request, concerning a 2011 Bulletin of CMS described in Category 1 below. But this request is intended to take in all other HHS sub-agencies.

This request includes any records in the custody, control, or possession of HHS, inclusive of all sub-agencies and all respective subdivisions of each agency. Please forward this request to all HHS sub-agencies that may be in possession of the requested documents. Nothing in these requests should be interpreted to be seeking personally identifiable information such as names or addresses. Any record responsive to a request that contains personally identifiable information should be redacted accordingly.

Abbreviations used herein:

"ERISA": Employee Retirement Income Security Act of 1974, Pub. L. 93-406, as amended.

"HIPAA": Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-191, as amended.

"PHSA": Public Health Service Act, Act July 1, 1944, ch. 373, as amended, and herein mostly concerning Title XXVII thereof, added by HIPAA and codified as 42 U.S.C. §§300gg et seq.

"ACA": Patient Protection and Affordable Care Act, Pub. L. 111-148 together with health-related provisions of Pub. L. 111-152, as amended.

Descriptions of Records

1. The time period for this category is all time up to your issuance of your September 1, 2011 Bulletin, whose identifiers include that the "Subject" was "Application of Individual and Group Market Requirements under Title XXVII of the Public Health Service Act when Insurance Coverage Is Sold to, or through, Associations." (Hereinafter, "the 2011 Bulletin.") For this category please refer to the 2011 Bulletin, at page 3 and the paragraphs that read as follows:

> CMS believes that, in most situations involving employment-based association coverage, the group health plan exists at the individual employer level and not at the association-of-employers level. In these situations the size of each individual employer participating in the association determines whether that employer's coverage is subject to the small group market or the large group market rules.
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> In the rare instances where the association of employers is, in fact, sponsoring the group health plan and the association itself is deemed the "employer," the association coverage is considered a single group health plan. In that case, the number of employees employed by all of the employers participating in the association determines whether the coverage is subject to the small group market or the large group market rules.

A. All records that reflect, describe, discuss or otherwise concern the criteria that you had used, relied upon or considered to determine whether a "group health plan exists at the individual employer level and not at the association-of-employers level," as you describe in the aforesaid passage. Please include in this sub-category such documents that any other agency of the Government had used, etc., to make such a determination jointly with your agency, or to make such a determination that your agency adopted for any purpose under your agency's purview, or that any State agency used, etc., to make such a determination.

B. All records that reflect, describe, discuss or otherwise concern the criteria that you had used, relied upon or considered to determine whether a situation involving a group health plan was one of the "the rare instances where the association of employers is, in fact, sponsoring the

group health plan and the association itself is deemed the 'employer,' [and] the association coverage is considered a single group health plan," as you describe in the aforesaid passage. Please include in this sub-category such documents that any other agency of the Government had used, etc., to make such a determination jointly with your agency, or to make such a determination that your agency adopted for any purpose under your agency's purview, or that any State agency used, etc., to make such a determination. Also when addressing this sub-category please include in the term "group health plan" any other welfare arrangement, though it might not technically involve a group health plan, defined (in conformity with some elements of ERISA, §3(40)(A)) as an arrangement which is established or maintained for the purpose of offering or providing any benefit described in ERISA, §3(1) to the employees of one or more employers (including one or more self-employed individuals), or to their beneficiaries.

C. All records that, in connection with your undertaking to issue a document such as the 2011 Bulletin (and that particularly addressed the topics of the aforesaid passage), or with your preparation of the 2011 Bulletin, identify (by citation or description) which statutory provisions (whether or not added or amended by the ACA) were among "the small group market or the large group market rules" that you meant in the aforesaid passage. The intent of this sub-category is that it includes, but is not necessarily limited to, all records that reflect, describe or concern any discussion of which statutory provisions were so meant by you.

D. For this sub-category, please refer especially to the assertion made by your final sentence from the aforesaid passage, reading: "In that case, the number of employees employed by all of the employers participating in the association determines whether the coverage is subject to the small group market or the large group market rules." All records that you had used, relied upon or considered in arriving at that assertion, or in supporting that assertion, or that discussed the question whether that assertion is true, including any that tended to the contrary of that assertion.

E. In this sub-category, the term "employer" refers to both an actual employer, or to a group, association, or other multiplicity of actual employers that falls, fell, or might have fallen within the definition of "employer" at §3(5) of the ERISA (29 U.S.C. §1002(5)) by operation of said §3(5), particularly the final clause relating to groups and associations. All records involved in your imposing the enforcement actions described in section 2722 of the PHSA (42 U.S.C. §300gg-22) or in considering whether to impose such actions, or involved in such imposition or consideration by a State government under such section, where the decision whether to impose such actions had the following characteristics:

I. The decision included a determination whether any "employer" involved in the matter was "small" or "large" for purposes of any provision of the PHSA, based on the number of employees of such "employer," and

II. The determination of the number of employees of such "employer" included a determination whether §3(5) of the ERISA, particularly the final clause relating to groups and associations, operated so that some group, association, or other multiplicity of actual employers would fall within the definition of "employer" in said §3(5).

The intent of "considering whether to impose such actions" in this sub-category includes, but is not necessarily limited to, the issuance, writing or consideration of advisory opinions, bulletins, or other guidance, whether addressing one or more particular "employers" or fact situations, or classes or categories of "employers" or fact situations (provided that the consideration had the aforesaid characteristics (I) and (II)).

2. The time period for this category is, first, approximately 1997 to 2013: specifically the effectiveness period of former §§2711 and 2713 of the PHSA (former 42 U.S.C. §§300gg-11 and 300gg-13) as added by HIPAA, being that period that began July 1, 1997 (apparently, per Pub. L. 104-191, §102(c)(2) but in any event the true first date of such effectiveness), and ending with the end of any plan years that began before January 1, 2014 (apparently, as to most amendments made by §1201 of Pub. L. 111-148, per its §1255, but in any event the true last date of such effectiveness as to non-grandfathered plans). Additionally, the time period for this category extends beyond such effectiveness period through the completion by you or any other Federal or State agency of decisions, actions, or the like concerning events or situations that occurred or existed during such effectiveness period.

In this category, the term "Original HIPAA small employer rights" means the right described in such former PHSA, §2711(a)(1)(A) that certain "health insurance issuer[s]" "must accept every small employer (as defined in section 2791(e)(4))," etc., and/or the right described in such former PHSA, §2713(a), namely: "In connection with the offering of any health insurance coverage to a small employer, a health insurance issuer— (1) shall make a reasonable disclosure to such employer, as part of its solicitation and sales materials, of the availability of information described in subsection (b), and (2) upon request of such a small employer, provide such information."

A. All records that reflect, describe, discuss or otherwise concern whether, as a general matter, in determining whether an actual employer, or member of a group, association, or other multiplicity of actual employers, that would otherwise be a "small employer" based on the number of employees of such employer, would not have Original HIPAA small employer rights by reason of (I) being such a member of a group, association, or other multiplicity of actual employers and aggregating the number of employees of such group, etc., of employers, and (II) the operation of §3(5) of the ERISA (29 U.S.C. §1002(5)), particularly the final clause relating to groups and associations.

B. All records that reflect, describe, discuss or otherwise concern whether, in the case of a particular actual employer or employer, or member(s) of a group, association, or other multiplicity of actual employers, in determining whether an actual employer, or member of a group, association, or other multiplicity of actual employers, that would otherwise be a "small employer" based on the number of employees of such employer, did not or would not have Original HIPAA small employer rights by reason of (I) being such a member of a group, association, or other multiplicity of actual employers and aggregating the number of employees of such group, etc., of employers, and (II) the operation of §3(5) of the ERISA (29 U.S.C. §1002(5)), particularly the final clause relating to groups and associations.

Please provide these records in a timely manner, and in a readily-accessible, electronic format where available, or otherwise in paper form. See 5 U.S.C. § 552(a)(3)(B). If HHS has destroyed or otherwise deems any requested record or portion of a record exempt from disclosure pursuant to one or more 5 U.S.C. § 552(b) exemptions, then please provide an explanation for the destruction or the basis for withholding the record or portion of a record, including (i) basic factual information about each destroyed or withheld record (author(s), recipient(s), date, length, subject matter, and location), (ii) the justification for the destruction or claimed exemption(s), and (iii) the interest protected by the exemption(s) that disclosure would harm. 5 U.S.C. § 552(a)(8)(A).

I believe that the records and documents sought are of great public interest and not exempt from required disclosure under FOIA. See generally, your final rule published at 83 Fed. Reg. 28912 et seq. (June 21, 2018) and the public controversy engendered about so-called "association health plans," reflected for example in the public comments for that rulemaking. In addition, given that disclosure of these records would be in the public interest, even if you determine that certain of the documents sought are exempt under FOIA, I request that you disclose these documents as a matter of agency discretion.

Request for Waiver of Fees

I request a waiver of searching and copying fees associated with these requests. Under FOIA, agencies must waive such fees where disclosure is likely to contribute significantly to public understanding of the operations and activities of the government and disclosure is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii). HHS has incorporated this requirement in its regulations for responding to FOIA requests. 45 C.F.R. § 5.54. Under the criteria set forth in the HHS regulations, such a waiver is appropriate here, as explained below.

> "Disclosure of the requested information would shed light on the operations or activities of the government. The subject of the request must concern identifiable operations or

activities of the Federal Government with a connection that is direct and clear, not remote or attenuated." 45 C.F.R. § 5.54(b)(1).

These requests concern only the operation or activities of the Federal Government. Specifically, they concern policy established by HHS to interpret "small employer" and/or "large employer" dependent provisions in the PHSA or other legislation, and the putative impact of ERISA, §3(5) on determining the number of employees.

"Disclosure of the requested information would be likely to contribute significantly to public understanding of those operations or activities." 45 C.F.R. § 5.54(b)(2). This disclosure would be likely to contribute significantly to the public understanding of the Federal Government's policy regarding so-called "association health plans." The information sought by this request is not already in the public domain. See 45 C.F.R. § 5.54(b)(2)(i).

Moreover, the disclosure will contribute to the understanding of a broad audience of persons interested in the subject. See 45 C.F.R. § 5.54(b)(2)(ii). The requester has been able to, and will continue to be able to, share understanding gained from the results of this request with communities concerned about American health-care law and policy, resulting from the ACA or otherwise. An example is his co-authorship of: Timothy Stoltzfus Jost and James Engstrand, Anomalies in the Affordable Care Act that Arise from Reading the Phrase "Exchange Established by the State" Out of Context, 23 U. Miami Bus. L. Rev. 249 (2015).

"The disclosure must not be primarily in the commercial interest of the requester." 45 C.F.R. § 5.54(b)(3). The requester has no plan to make commercial use of the information provided, only to support analysis, and possible public understanding, of the issues involved.

Please send all requested materials, for electronic records, to [redacted], or for paper records to the address provided above, within 20 business days as required by FOIA.

Thank you for your attention to the matter.

Very truly yours,

James Engstrand