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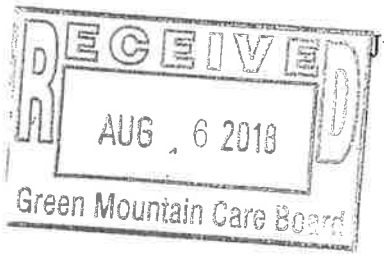

July 31, 2018

Robin J. Lunge, J.D., MHCDS
Green Mountain Care Board
144 State Street
Montpelier, VT 05620

Dear Board Member Lunge,

This letter responds to the question you posed to me during the Blue Cross Blue Shield rate hearing on July 23, 2018 in GMCB Docket #009-18rr. Specifically, you asked for clarification on the Department's view of the preemptive scope of the recently promulgated federal Department of Labor Rule governing Association Health Plans (AHPs). See Transcript at 263.

Before the DOL rule, ERISA generally subjected multi-employer welfare arrangements (MEWAs) to state insurance regulation, and specifically subjected self-insured MEWAs to all state insurance laws not inconsistent with Title I of ERISA. ERISA § 514(b)(6), 29 U.S.C. § 1144(b)(6); *see also Fuller v. Norton*, 86 F.3d 1016 (10th Cir. 1996). With respect to the 2018 rule, DOL has repeatedly indicated that the definition change is not meant to alter federal preemption in this area and that states continue to have broad authority to regulate insurance generally, and particularly self-insured AHPs:

> The Department agrees that the final rule does not modify or otherwise limit existing State authority as established under section 514 of ERISA. If an AHP is fully insured, ERISA section 514(b)(6)(A)(i) provides that State laws that regulate the maintenance of specified contribution and reserve levels (and that enforce those standards) may apply, and State insurance laws are generally saved from preemption when applied to health insurance issuers that sell policies to AHPs and when applied to insurance policies that AHPs purchase to provide benefits. In addition, in the case of fully-insured AHPs, it is the view of the Department that ERISA section 514(b)(6) clearly enables States to subject AHPs to licensing, registration, certification, financial reporting, examination, audit and any other requirement of State insurance law necessary to ensure compliance with the State insurance reserves, contributions and funding obligations. *Furthermore, under this framework, if an AHP established pursuant to this final rule is not fully insured, then, under section 514(b)(6)(A)(ii) of ERISA, any State law that regulates insurance may apply to the AHP to the extent that such State law is "not inconsistent" with ERISA.*

Preamble to the Amendment to 29 C.F.R. Part 2510, at 92-93 (emphasis added). In other words, "the final rule does not change existing ERISA preemption rules that authorize broad State insurance regulation of AHPs, either through the health insurance issuers

through which they purchase coverage or directly in the case of self-insured AHPs." *Id.* at 52; *see also id.* at 62, 83, 96, 119, and 153.

Based on these DOL statements, and on similar oral representations by DOL on calls with state regulators, the Department believes that it has substantial authority to regulate AHPs generally, and self-insured AHPs specifically. As I testified at the hearing, the Department is currently drafting emergency rules governing fully-insured AHPs, and anticipates promulgating rules governing both fully- and self-insured AHPs later this year.

Generally, although the threat of preemption appears more acute with respect to self-insured AHPs, the DOL rule also suggests more broadly that preemption is possible with respect to fully-insured AHPs if State regulation contravenes the intent of the DOL rule.

Sincerely,

Michael S. Pieciak
Commissioner of Financial Regulation

cc: Green Mountain Care Board
BCBSVT, c/o Jackie Hughes
Vermont Health Care Advocate, c/o Jay Angoff