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August 7, 2017

Mr. Timothy Hauser
Deputy Assistant Secretary for Program Operations
Employee Benefits Security Administration
US Department of Labor
Washington DC

Filed: www.Regulations.gov

Dear Deputy Assistant Secretary Hauser:

The BlueCross Blue Shield Association (BCBSA) welcomes the Department of Labor's (DOL's) Request for Information (RFI) issued on July 6, 2017, in connection with the agency's definition of the term "fiduciary" ("Conflict of Interest") rule (the "Rule"). The RFI specifically seeks feedback on possible changes to the rule and/or exemptions.

BCBSA is the national federation of 36 independent community-based and locally operated BlueCross Blue Shield Plans (Blue Plans) that collectively provide health care coverage for more than 106 million persons- one in three Americans. BlueCross and BlueShield Plans offer coverage in every market and every zip code in America.

In revising the definition of when a person becomes a "fiduciary" by reason of the provision of investment advice under ERISA, we understand that the DOL's intention is to protect retirement investors from the potential conflicts of interest of their financial advisors, and we support that objective. Nonetheless, BCBSA remains concerned that the final rule significantly curtails the information, education and services available to employers that purchase group health insurance coverage, as well as their employees. We believe that the inclusion of health insurance activities within the Rule's scope was not the primary focus of the agency, and there is no evidence in the rulemaking record that extending the Rule's reach to group health insurance policies resolves any identified regulatory problem or mitigates financial losses experienced by group health plans or their participants. In this regard, the benefits provided by health insurance contracts are fundamentally different from retirement savings benefits relied on by Americans

from their retirement plans and IRAs. Potential conflicts associated with the sale of health insurance policies do not pose the same long-term impact on savings. We again ask the Department to exclude group health insurance policies from the rule entirely and unconditionally.

There are two documents that we wish to share with the agency at this time to reiterate our request to exempt group health insurance and related activities unconditionally from the final Rule:

(1) A Groom Law Group memo from June 10, 2015 that speaks to the Department's proposal to expand the "fiduciary" definition under ERISA to insurance policies issued to group health plans; and

(2) A July 20, 2015 BCBSA comment letter to the Department of Labor specifically offering recommendations on the proposed rule, with emphasis on the recommendation for HSAs to be carved out of the rule based on their fundamental distinctions from IRAs and other retirement investment vehicles.

In addition, while BCBSA was pleased that the Final Rule adopted many of our recommendations, we remain concerned that our recommendation to carve out HSAs was not adopted. This has complicated and limited many different aspects of marketing, sale and education related to Health Savings Accounts (HSAs). For the reasons set forth in our attached July 20th, 2015, comment letter we again urge the DOL to exclude HSAs from coverage under the rule, based on the fact that the vast majority of HSAs hold relatively small balances, are not relied upon by Americans for significant retirement savings, and consistent with DOL's existing guidance exempting nearly every HSA from ERISA's fiduciary standards. Our letter sets forth our concerns and comments in greater detail.

We appreciate this opportunity to again raise our issues and recommendations and hope as a result of responses to this RFI the agency will adopt our recommendations to exempt group health insurance contracts and HSAs from this rule completely.

Thank you.



Kris Haltmeyer
Vice President, Legislative and Regulatory Policy

Attachments



**BlueCross BlueShield
Association**

An Association of Independent
Blue Cross and Blue Shield Plans

July 20, 2015

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

**Re: Definition of the Term "Fiduciary;" Conflict of Interest Rule –
Retirement Investment Advice
RIN 1210-AB32**

Dear Sir:

The Blue Cross Blue Shield Association ("BCBSA") appreciates the opportunity to provide comments with respect to the Department of Labor's (the "Department") notice of proposed rulemaking concerning the Definition of the Term "Fiduciary" of an employee benefit plan published on April 20, 2015, 80 Fed. Reg. 21928 (the "Proposed Rule").

BCBSA is a national federation of 36 independent, community-based, and locally-operated Blue Cross Blue Shield Plans ("Blue Plans") that collectively provide health care coverage for more than 105 million – one in three – Americans. Blue Cross Blue Shield Plans offer coverage in every market and every ZIP Code in America. Plans also partner with the Government in Medicare, Medicaid, the Children's Health Insurance Program, and the Federal Employees Health Benefits Program.

The Department's objectives in revising the definition of when a person will become a fiduciary by reason of the provision of investment advice under ERISA is intended to protect retirement investors from the potential conflicts of interest of their advisers. While the Department's goals are important, BCBSA is very concerned that the Proposed Rule may unintentionally, but adversely, impact the information and services available to employers that purchase health insurance coverage, as well as their employees. This is because, as drafted, the Proposed Rule could be read to apply to any recommendation or suggestion made to purchase an insurance contract to a sponsor of any ERISA plan. In short, any person that provides helpful education and information that might constitute a suggestion or recommendations concerning an insurance policy may be a "fiduciary" and face significant liability under ERISA, even when they are clearly operating in an educational, marketing and sales capacity. We think this result was likely not intended by the Department, particularly since health insurance contracts are substantially different than the types of investment vehicles associated with retirement plans, which are the clear concerns of the Proposed Rule.

Unless changes are made to exempt health insurance coverage from the Proposed Rule, we are concerned that employers that shop for coverage are likely to lose access to valuable educational and sales-related information as insurers and agents may end up limiting the information they provide to consumers to protect themselves from new liability under ERISA. We are also concerned that Blue Plans will have to develop costly new compliance procedures to comply with the Proposed Rule even though we believe that regulating the sale of health insurance was not a goal of the Proposed Rule. The Proposed Rule would be particularly

burdensome on Blue Plans, since many employ their own captive insurance agents and as a result Blue Plans themselves could have potential fiduciary liability for the sale of their own products. Making these agents fiduciaries to ERISA plans will be particularly challenging since they sell only proprietary Blue insurance plans and have no ability to consider or recommend coverage from other insurers. There could be many other negative and inadvertent impacts on health insurers, including the development of insurance plans through private exchanges, and the tools made available to consumers shopping for insurance coverage. These market-driven developments create competitive insurance markets and informed consumers and should be encouraged, rather than discouraged by the Department.

Finally, the rule also sweeps in Health Savings Accounts (HSAs), even though such accounts are not primarily intended as investment vehicles, but are instead tax advantaged accounts designed as a tool used by individual employees to accumulate funds to satisfy a variety of out of pocket costs not covered by their health insurance plans (such as deductibles and co-pays).

There has been no evidence that imposing regulatory burdens on ERISA-covered insured health plans is a necessary part of the Department's effort to regulate conflicts of interest that might affect retirement investors. Nothing in the Proposed Rule, or its regulatory impact analysis, suggests that this is the desire or intent of the Department. Moreover, the American public would be better served if Blue Plans could direct their limited resources to continuing to emphasize compliance with the Affordable Care Act.

We therefore request a number of revisions to the Proposed Rule that "carve-out" health insurance coverage and HSAs from the scope of the Proposed Rule. By carving out health plans the Department would be acting consistently with its decision to exempt health plans from its service provider disclosure rule (under ERISA section 408(b)(2)), which it finalized just three years ago. And by carving out HSAs the Department would be acting consistently with its decision to exempt HSAs from ERISA when it issued Field Assistance Bulletins in 2004 and 2006.

BCBSA's recommendations on the Proposed Rule are as follows:

- I. **A "carve-out" should be provided in the regulation so that recommendations related to insurance contracts that are used to fund health and welfare benefits, including medical, dental, life, death and dismemberment, disability, and other similar insurance coverages, are clearly excluded from "fiduciary advice" regardless of the size of the ERISA plan. This should be an unconditional carve-out (e.g., no disclosure and consent by the plan sponsor should be required).**
- II. **The marketing of private exchanges to a plan fiduciary should be subject to an unconditional carve-out from the definition of "fiduciary advice."**
- III. **The carve-out BCBSA recommends should also extend to circumstances where insurers, private exchanges and others develop and use web-based and similar computer driven tools that assist consumers in selecting among various**

insurance plan options that an employer may make available to them under their ERISA group plans.

- IV. HSAs should also be carved-out completely from the regulation based on their fundamental distinctions from IRAs and other retirement plan investment vehicles. If a complete carve-out for HSAs is not provided, the Department (1) should exempt any HSA holding less than \$5,000, reflecting the fact that smaller HSA accounts should not be treated as investment funds, (2) the Proposed Rule's platform carve-out should be expanded to cover HSAs, and (3) the Proposed Rule's education carve-out should explicitly cover information provided to HSA holders regarding the benefits, features and uses of HSAs.**

BCBSA's more detailed comments are attached.

We appreciate the opportunity to provide comments regarding the Proposed Rule and look forward to continuing to work with you as you finalize and implement this regulation. If you have any questions, please contact Jane Galvin at jane.galvin@bcbsa.com or 202.626.8651.

Sincerely,

Justine Handelman
Vice President, Legislative and Regulatory Policy
Blue Cross Blue Shield Association

**BCBSA Comments and Recommendations on
DOL's Proposed Rule addressing the Definition of the Term "Fiduciary";
Conflict of Interest Rule—Retirement Investment Advice**

I. Agents, Brokers and Consultants who Recommend Health and Welfare Insurance Policies to Employers for ERISA-covered Plans could be Fiduciaries based on their Recommendations Alone

Issue: Agents, Brokers and Consultants who recommend group insurance policies to sponsors of ERISA-covered health and welfare benefit plans could become "fiduciaries" under DOL's Proposed Rule based on their recommendation of one or more insurance policies.

Recommendation: The regulation should be modified so that recommendations of insurance contracts to ERISA-covered health and welfare plans and their participants are clearly excluded from the definition of "fiduciary advice." Specifically, we recommend that the Department incorporate into the final rule a new "carve-out" from fiduciary status for the purchase, sale or holding of an insurance contract that is used to fund health and welfare benefits. The exception would apply without conditions and regardless of plan size.

If an unconditional carve-out as described above is not acceptable, BCBSA proposes that the Proposed Rule's existing counterparty exception be available for the purchase, sale or holding of a group insurance contract that is used to fund health and welfare benefits. This exception would apply regardless of plan size.

Rationale: Under the Department's current regulation defining investment advice, ordinary education, marketing and sales activities for group health insurance policies typically would not become fiduciary advice. The Proposed Rule substantially expands the circumstances in which persons providing recommendations to plan sponsors, employers or plan participants would be considered "investment advice" fiduciaries. Specifically, under the Proposal, fiduciary advice would include a "recommendation" as to "the advisability of acquiring, holding, disposing or exchanging securities *or other property*" if it is provided under an agreement, arrangement or understanding that the advice is individualized to, *or specifically directed to*, the advice recipient for consideration in making investment or management decisions with respect to securities or other property. DOL Prop. Reg. 2510.3-21(a)(1), (2)(ii).

Importantly, while the BCBSA believes the definition of investment advice is focused on retirement plans and IRAs that hold assets for investment, neither the Proposal nor the Department's current regulation distinguishes between retirement plan advisers and advisers to welfare plan fiduciaries. Instead, if all of the elements of the investment advice definition are met, a recommendation to purchase "securities *or other property*" could result in fiduciary status, whether the recipient of that recommendation is a pension plan fiduciary or the fiduciary (typically the employer plan sponsor) of a health plan, or any other "welfare" plan, such as a life insurance or disability plan. And, under current law and the Proposal, an insurance policy

funding a health, life or disability plan is considered to be "securities or *other property*." See Preamble to Proposed Class Exemption PTE 77-9, 41 Fed Reg. 56760, 56762 (Dec. 29, 1976) (DOL recognizes that advice and recommendations made by insurance agents could rise to "investment advice so as to classify the persons who furnish such advice as fiduciaries."); *Capital Creation Co. v. Metropolitan Life Ins.*, No. 1:90CV1322, 1992 WL 218296, at *10 (N.D. Ohio Aug. 26, 1992) (the provider rendered investment advice as to the value "of securities or other property" when it made "recommendations to the Beazer Plan as to the advisability of investing in, purchasing, or selling group annuity contracts.").

Agents, brokers and consultants to insured group health welfare plans provide a variety of information and advice to plan sponsors, including information about the relative financial strength of insurers, differences between various insurance coverages, explanations of key features under competing policies, and pricing. With respect to pricing, the information and advice may not be limited to differences between competing bids, but the consultant may also evaluate proposed pricing as it relates to the plan's past and expected experience under the policies. These agents and brokers provide invaluable expertise to an employer that helps the employer to match an appropriate policy to its employee population, in many cases based on the unique needs of the employer's group. Agents and brokers may ultimately "suggest" that the employer select a particular insurance policy. If these activities could give rise to fiduciary status under DOL's regulation for agents and brokers, then any payment to the agent (including a consulting fee or an insurance commission) would solidify fiduciary status as well as cause a prohibited transaction, unless an exception or prohibited transaction exemption is available. Without limits on the Proposed Rule's scope, BCBSA believes that recommendations to purchase many forms of group welfare insurance contracts could be swept into the rule, including group medical, dental, life, disability, long term care, accidental death and dismemberment.

Moreover, subjecting those who recommend health insurance contracts to ERISA's fiduciary requirements would create particular market disruptions for Blue Plans that the Department could not have intended and are not in the interest of plan participants. In particular, many Blue Plans employ their own captive agents (who are employees of the Plan) who can only recommend Blue insurance plans. We are concerned that if Blue Plan captive agents are fiduciaries they may be exposed to meritless ERISA claims for selling only affiliated products. Exposing Blue Plans to potential litigation for selling only affiliated products make no sense because the employer group that buy Blue products fully understand that a Blue Plan agent can only sell affiliated products and would have already determined that they want to access the Blue Plan insurance policy.

Under the Proposal, there are two possible strategies for permitting agents, brokers and consultants to receive commissions in connection with the placement of insurance with ERISA plans, but each has limitations or uncertainties. First, advice incidental to the sale of an insurance policy may qualify for the Proposal's "counterparty carve out," an explicit exception to fiduciary status under the Proposal. DOL Prop. Reg. 2510.3-21(b)(1)(i)(B). However, this exception is available only for the sale of insurance to large plans (plans with 100 or more participants) and it is conditioned on disclosure to the prospective client of the "interests" the

person has in the sale of the insurance (e.g., the commissions and other payments received) as well as the client's written acknowledgement that the agent, broker or consultant is not undertaking to provide impartial advice--all of which must be provided in *advance* of any recommendations. In addition, the agent, broker or consultant may not receive any compensation directly from the plan for the provision of the advice. Second, the agent, broker or consultant could rely on Prohibited Transaction Exemption ("PTE") 84-24 to receive an exemption for the conflict of interest created by the potential for the commission. That exemption currently requires advance disclosure to and consent of the employer before the policy is purchased (but not before the advice is given) and this exemption is being amended by the Proposal to require additional "conflicts" disclosures and a new "best interest" standard of conduct.

Although these approaches may technically be available, they introduce significant complexity based on the size of the plan sponsor, create fiduciary liability for merely selling insurance to smaller plans, impose disclosure obligations on Plans, and require the consent of the plan sponsor. BCBSA simply does not view guidance with respect to health and welfare insurance contracts to be fiduciary "investment advice." Buying a health and welfare plans insurance contract is fundamentally different than retirement investing. The purchaser of the insurance contract knows the cost of the policy and the benefits in advance. Any fees or sales commissions associated with the contracts do not affect the benefits that will be received. This contrasts starkly with retirement plans, where the costs of investment options could actually reduce the retirement benefit itself, and the fees paid to financial advisers could create incentives to invest amounts in higher-cost or lower-returning investments.

Finally, we note that the Proposed Rule could actually create new incentives for employers to self-insure their health plans. This is because under the Proposed Rule agents could become fiduciaries for recommending an insurance contract (which is "other property" as noted above). But the same agent may not become a fiduciary for recommending an administrative services only arrangement (because they are recommending an administrative "service" rather than "property").

As such, BCBSA recommends that the Department modify the Proposed rule and to carve-out recommendations to purchase insurance contracts for health and welfare plans. In so doing, the Department would be acting consistent with its exemption for health and welfare plans when it issued its service provider disclosure regulation under ERISA section 408(b)(2) (issued in final form in 2012).

II. The Marketing of a Private Exchange Should not be Fiduciary Advice

Issue: It is not clear whether the marketing or offering of a private exchange itself would be deemed to be fiduciary advice under the Proposed Rule. This is because such marketing efforts may involve "recommendations" of a platform of insurers and insurance policies offered through the private exchange.

Recommendation: As recommended in section I above, BCBSA requests that the Department incorporate into the final rule a new carve-out from fiduciary status for the purchase, sale or holding of an insurance contract that is used to fund health and welfare benefits. The exception would apply without conditions and regardless of plan size. This carve-out should be broadly applicable to the recommendations of policies offered through a private exchange or the recommendation of the private exchange itself.

If an unconditional carve-out is not provided, then the Proposed Rule's existing counterparty carve-out should be expanded to cover any recommendations of exchanges, insurers or insurance policies offered in connection with an ERISA-covered health and welfare plan regardless of plan size.

Rationale: Many private parties, including insurers, are offering insurance products to employers through a private exchange. Private exchanges (and services associated with the exchange) provide a means for employers to outsource the administrative burdens and legal complexity associated with offering a group health plan. The exchange provider would typically perform such functions as distributing SPDs, maintaining a call center for employees, assisting in enrollment and making eligibility determinations. The exchange also creates a simple consumer shopping experience, where employees can readily compare the benefits and cost-sharing features of various plans.

BCBSA is concerned that recommending a private exchange (and the different insurance policies on the exchange) could give rise to fiduciary status under the Proposed Rule. This is because the Department has already suggested that offering an investment platform could be fiduciary advice and requires a "platform carve-out." We are also concerned because fiduciary status may be triggered by any recommendation to a plan fiduciary "as to the advisability of acquiring, holding, disposing or exchanging securities or other property...." DOL Prop. Reg. 2510.3-21(a)(1). And the term "recommendation" is defined broadly as meaning any communication that, based on its context, would reasonably be viewed as a "suggestion" that the advice recipient engage in or refrain from taking a particular course of action. DOL Prop. Reg. 2510.3-21(f)(1). Under this sweeping framework, the marketing of a private exchange to an employer who sponsors an ERISA-covered group health plan for its employees could arguably involve one or more "recommendations" of the insurers or insurance policies that are offered on the exchange.

BCBSA believes that the marketing of private exchanges that offer employers and employees access to individual insurance policies should not be swept into fiduciary conduct. Without this clarification, the added fiduciary liability and administrative complexity associated with compliance with a class exemption (such as PTE 84-24 or the proposed Best Interest Contract exemption) could increase costs, compliance burdens, and dissuade companies from offering private exchanges at all.

III. Advice to Participants regarding Individual Insurance Policies available through a Private Exchange should not be Fiduciary Advice

Issue: Web-based and similar computer generated tools that provide information to plan participants regarding insurance options that may be appropriate for them should not give rise to fiduciary liability under the Proposed Rule.

Recommendation: As recommended in section I above, BCBSA requests that the Department incorporate into the final rule a new carve-out from fiduciary status for the purchase, sale or holding of an insurance contract that is used to fund health and welfare benefits. The exception would apply without conditions and regardless of plan size. This carve-out should be broadly applicable to permit web-based, computer-generated information and recommendations to plan participants as to which plan option may be appropriate for the participant.

Rationale: Employers may make a variety of different plan options available to plan participants (e.g., HMO, PPO, different deductibles, different networks). This is increasingly common now that employers may offer many insurance options via a private exchange. Tools are being developed that assist consumers in determining what option may be appropriate for them, given their circumstances. These tools are commonly computer generated web-based tools that take into account a variety of information, including income level, dependents, health status, cost-sharing preferences, geographic location, preferred providers, etc.

BCBSA is concerned that a recommendation made to a plan participant regarding various insurance options could give rise to fiduciary status under the Proposed Rule. However, individualized recommendations about health plan insurance options should not be the subject of the Proposed Rule, which is focused on retirement plans and conflicts of interest faced by financial advisers. Given the complexity of the health care options, individuals need access to a wide variety of information sources so they can make good consumer choices that reflect their individual circumstances.

IV. Relief Should Be Granted for Health Savings Accounts

Issue: HSAs are explicitly covered by the Proposed Rule even though they are not retirement accounts and even though they generally have very low account balances that are used to fund current medical costs. In addition, under the Proposed Rule a custodian's offering of a "platform" of investments to an HSA might make the custodian a fiduciary since there is no "platform" carve-out for HSAs.

Recommendation: The Proposed Rule needs to be revised to exempt HSAs entirely. If a complete carve-out for HSAs is not provided, the Department (1) should exempt any HSA holding less than \$5,000, reflecting the fact that smaller HSA accounts should not be treated as investment funds, (2) the Proposed Rule's platform carve-out should be expanded to cover HSAs, and (3) the Proposed Rule's education carve-out should explicitly cover information provided to HSA holders regarding the benefits, features and uses of HSAs.

Rationale: HSAs are fundamentally different from IRAs and other retirement vehicles. Instead, they are tax-advantaged accounts that may be used to fund cost sharing and other medical expenses not covered by a high deductible health plan. HSAs generally hold amounts that are less than the deductible amounts required under the associated group health plan. In 2014, the average HSA account balance was about \$2,000.¹ Moreover, investment options are an optional feature of HSA products and many HSA providers do not even make investment options available in connection with HSAs. As such, only a small number of accountholders actually utilize investment options.² Instead, the vast majority of HSA assets are held in bank deposit arrangements that utilize debit cards or checking features to make payments. Unlike IRAs, HSA account holders are not subject to penalties for any "early" use of funds, nor can HSAs accept rollover contributions. These facts demonstrate that HSAs are designed and utilized in the vast majority of cases as a source of ready funds for current medical expenses and will not accumulate a significant amount of assets from year to year. Because of their special nature, DOL generally recognized that HSAs should be exempt from ERISA, even where an employer takes steps that would normally amount to "endorsement" under ERISA. DOL Field Assistance Bulletin 2004-01 (Apr. 7, 2004); Field Assistance Bulletin 2006-02 (Oct. 27, 2006). Because the DOL has carved HSAs generally out of Title I of ERISA, it does not make sense to subject HSA providers to the detailed requirements and compliance regimes associated with the Proposed Rule.

Nonetheless, the Proposed Rule specifically includes HSAs in its definition of covered plans. As such, virtually any information to an HSA accountholder on how to allocate their assets is going to be fiduciary advice. In addition, an HSA provider (e.g., bank, custodian) may be a fiduciary simply by making investments available to the HSA because the Proposed Rule's platform carve-out does not extend to HSAs (and IRAs generally). This is inappropriate given the limited investment opportunities available through HSAs.

Because HSAs are not designed to serve as retirement vehicles, we ask that the Department remove HSAs from the definition of a "plan" subject to the Proposed Rule. This would be entirely consistent with the Department's determination to generally exempt HSAs from ERISA when it issued the FABs in 2004 and 2006. Absent a complete exemption, we recommend that the Department (1) should exempt any HSA holding less than \$5,000, reflecting the fact that smaller HSA accounts should not be treated as investment funds, (2) the Proposed Rule's platform carve-out should be expanded to cover HSAs, and (3) the Proposed Rule's education carve-out should explicitly cover information provided to HSA holders regarding the benefits, features and uses of HSAs.

¹ See EBRI Issue Brief #409, Health Savings Accounts and Health Reimbursement Arrangements: Assets, Account Balances, and Rollovers, 2006-2014, January 2015, available at www.ebri.org/publications/.

² See 2014 Year-end HSA Market Statistics and Trends, Executive Summary, available at www.devenir.com/research/2014-year-end-devenir-hsa-market-research-report/.