UPMC HEALTH PLAN

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Submitted electronically via: e-ORI@dol.gov

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

Re: Proposed Rule Change to Definition of the Term "Fiduciary" -- Conflict of Interest Rule--Retirement Investment Advice
RIN 1210-AB32

Dear Sir or Madam:

UPMC Health Plan and the entire UPMC Insurance Division (collectively "UPMC") are pleased to respond to the Department of Labor's solicitation for comments regarding the above-referenced Proposed Rule Change to expand the definition of "fiduciary," published in the Federal Register on April 20, 2015. As an organization that sponsors health savings accounts that "are not intended for retirement savings," the Proposed Rule has far reaching implications for us and we appreciate any consideration you will give to our comments.

UPMC offers a wide range of commercial, Medicare, and Medicaid health insurance products to consumers in Pennsylvania, West Virginia, and Ohio. Since beginning operations in 1997, UPMC has grown consistently and today proudly serves more than 9,600 employers and 2.7 million members. UPMC Health Plan was recently ranked number twenty (20) in the nation among an overall ranking of 507 private plans in "NCQA's Private Health Insurance Plan Rankings 2014-2015." In an effort to provide members a broad range of health insurance products designed to meet individual needs, UPMC offers the option of Health Savings Accounts (HSAs) in conjunction with High-Deductible Health Plans (HDHPs).

HSAs are tax-advantaged savings accounts and are particularly valuable for members purchasing HDHPs. HDHPs are increasingly popular health insurance options designed for those individuals who are comfortable with bearing the risk of total health care expenses up to a pre-determined cap, typically $6,450 per year per member and $12,900 per year per member family. HSAs sold in conjunction with HDHP allow members to utilize pre and post-tax contributions to cover qualified health care expenses. So long as these members maintain balances within their HSAs of at least $2,000, the account holder may invest the remainder of the HSA balance in money market bank accounts, CD's, or in one or more mutual funds chosen from a broad platform of investment options. Importantly, and as set forth in more detail below, UPMC has no input into the accounts, CDs or funds in which its members invest these excess funds.

UPMC Health Plan supports the objective addressed by the Proposal; specifically, to protect retail investors from making investment decisions based upon advice that could be tainted by self-dealing or conflicts of interest. However, the Proposal as written could be read to include within its reach HSA administrators and health insurers that, like UPMC, receive premiums or administrative fees to administer the HDHP/HSAs and distribute to account holders broad non-individualized platforms of investment options, into which they have had no input or discretion.

Our concern is derived from the proposed definition of "fiduciary," which is an entity that:

- renders investment advice
- directly to a plan participant
- in exchange for a fee or other compensation whether direct or indirect, including
- a recommendation as to the investment of securities,
- where such advice is specifically directed to the advice recipient
- for consideration in making investment decisions with respect to … [an HSA].[1]

Currently, UPMC contracts with an independent custodian ("Custodian") to serve as the banker/trustee of its HSA deposits. To facilitate investments, the Custodian selects a broad range of asset funds operated by a variety of investment managers, representing a spectrum of risk tolerance measures. The platform of options is prepared by the Custodian but, as a convenience, is mailed by UPMC to each HSA account holder on an annual basis. UPMC has no input or discretion into the funds contained on the platform. The Proposed Rule Change, however, could nonetheless be interpreted to impose a fiduciary obligation on UPMC because UPMC: (1) receives routine non-investment related premium and/or administrative fees from its HDHP/HSA members, and (2) disseminates to those members the selected investment platform prepared by the Custodian. The risk of such liability will undoubtedly either discourage carriers from offering this increasingly popular coverage-option altogether or increase the cost of such products due to the detailed due-diligence, investment investigation and on-going monitoring of investment options that would be required of carriers as fiduciaries. Such a result would neither protect nor benefit consumers.

Moreover, the Proposed Rule Change does not account for the existing reduction of risk attendant with the portability and independence of HSAs. As explained to the retail investor in IRS Publication 969, an individual may establish his or her own HSA for payment of applicable HDHP deductibles and co-pays, independent of his or her employer or health insurer and, therefore, independent of any employer or insurer suggested investment platform. Because HSAs are not "captive" to employer or insurer suggested investment options, the self-dealing risks attendant with dependence upon insurer or administrator investment options are notably reduced. Further, HSAs are fully portable. At any time, an HSA account holder can direct the

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[1] The proposed definition includes "any … health savings account described in section 223(d) of the Code."

trustee/custodial bank of an employer-related account to transfer the entirety of the HSA to the trustee of an existing HSA; or, once per year, the account holder can roll the entirety of his or her HSA into a new HSA, with self-selected investment options, and without implicating annual contribution limits. These features protect an investor by permitting full and independent control over existing and future investment options.

For each of the foregoing reasons, UPMC Health Plan believes the proposed changes impose too broad a burden unrelated to the stated goals of retail investor protection. UPMC Health Plan believes that the current Proposal should be amended to exclude HSAs entirely, or amended to expand the Section (b)(3) Platform Providers "carve out" to include HSA administrators and insurers providing an independently selected broad non-individualized platform of investment options to their members. UPMC appreciates the opportunity to provide comments on the Proposed Rule. We are available to provide additional information at the contact information indicated herein.

Respectfully submitted,

Sheryl A. Kashuba
Chief Legal Officer
Vice President, Health Policy
UPMC Health Plan