America's Health Insurance Plans

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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 on the Definition of the Term "Fiduciary" and Prohibited Transaction Exemptions

Submitted Electronically: www.regulations.gov

Dear Sir or Madam:

America's Health Insurance Plans (AHIP) is writing in response to the Proposed Rule and related Prohibited Transaction Exemptions (PTEs) published by the Employee Benefits Security Administration (EBSA) in the *Federal Register* on April 20, 2015. The Proposed Rule and PTEs are intended to address perceived abuses with respect to investment advice given to employee benefit plans, plan fiduciaries, plan participants and beneficiaries, Individual Retirement Accounts (IRAs), and IRA account holders.

AHIP's members provide insurance coverage to and administrative services for employee welfare plans governed by the Employee Retirement Income Security Act (ERISA). The insurance products and administrative services offered by AHIP members support coverage for major medical, dental, vision, long-term care, supplemental, and disability income benefits. In addition, AHIP represents financial institutions that offer custodial services in connection with health savings accounts (HSAs) and Archer medical savings accounts (MSAs). Aspects of each of these arrangements could potentially be subject to the Proposed Rule and PTEs as currently written.

EBSA has not cited any specific concerns or complaints with respect to health benefits offered in connection with employee welfare plans. In fact, EBSA's regulatory impact analysis, including the supporting research available from EBSA, is focused entirely on retirement investing (IRAs and pension plans) and does not purport to address the impact of "conflicted advice" on welfare plans. In addition, no information has been presented regarding the use of HSAs or MSAs in connection with employee welfare plans and evidence has not been provided to demonstrate that employers or employees are being harmed by improper investment advice in connection with such accounts.

Employee welfare plans are significantly different from employee pension plans in structure and purpose. Employees who participate in employer-sponsored health and welfare plans do not bear risk in the same manner as individuals investing in pension plans. Consequently it would be a mistake to apply the same requirements to both types of arrangements. Subjecting welfare plans and insurance provided to such plans to the same investment fiduciary standards as applied to pension plans will result in significant disruptions for employers and employees.[1]

As discussed below, we recommend that the Proposed Rule not apply to insurance coverage provided to employee welfare plans and to HSAs and MSAs.[2]

Application of the Proposed Rule to Employee Welfare Plans

The Proposed Rule appears to be intended to target investment advice affecting decisions about retirement savings. As stated in the Preamble to the Proposed Rule, EBSA believes new rules are needed to address the expansion of retirement savings options available to employees since the Department of Labor last issued regulations governing investment fiduciaries in 1975:

> When the Department promulgated the 1975 rule, 401(k) plans did not exist, IRAs had only just been authorized, and the majority of retirement plan assets were managed by professionals, rather than directed by individual investors. Today, individual retirement investors have much greater responsibility for directing their own investments, but they seldom have the training or specialized expertise necessary to prudently manage retirement assets on their own. As a result, they often depend on investment advice for guidance on how to manage their savings to achieve a secure retirement. In the current marketplace for retirement investment advice, however, advisers commonly have direct and substantial conflicts of interest, which encourage investment recommendations that generate higher fees for the advisers at the expense of their customers and often result in lower returns for customers even before fees.

[1] EBSA took a similar approach when it originally subjected both employee welfare plans and employee pension plans to the same service provider regulations. After consideration of comments from interested parties it was decided to limit the application of those rules to pension arrangements.
[2] Although we believe that welfare plans and health spending accounts (HSAs and MSAs) should not be subject to the Proposed Rule, if EBSA believes specific problems exist, those concerns should be identified and additional time should be provided for the industry and other interested parties to respond with recommendations to address such issues.

80 Fed. Reg. 21930. This focus on protecting participants in pension plans was highlighted in recent Congressional testimony regarding the Proposed Rule by the Secretary of Labor:

> Retirement security is a fundamental pillar of the middle class. We must ensure that Americans who work hard and save responsibly for retirement are getting a fair share of the returns on those savings. This Subcommittee knows too well that there is a retirement crisis in America and that not enough Americans are saving for retirement. I'm deeply concerned that even if you've done the right thing, worked hard, and saved what you could, you could end up in a situation where you do not have what you need for retirement simply because your adviser isn't required to put your interests first. The majority of advisers already do the right thing and serve their clients' interests first, but most Americans do not have room for error and cannot afford to invest in products with unnecessarily high fees or low returns that benefit their advisers but do not meet their own needs.

Statement of Thomas E. Perez, Secretary U.S. Department of Labor Before the Health, Employment, Labor and Pensions Subcommittee, Committee on Education and the Workforce, U.S. House of Representatives, June 17, 2015.

Unfortunately, the definition of an "investment fiduciary" in the Proposed Rule is broadly written and could conceivably apply to a broad range of entities and individuals that offer insurance products or health care spending accounts to employee welfare plans. As a result, the marketing of insurance products to welfare plans or discussions with employees about coverage options under the plan could arguably be considered investment advice under the Proposed Rule.

"Investment advice" for purposes of the Proposed Rule includes recommendations as to:

- The "advisability of acquiring, holding, disposing or exchanging securities or other property . . . ."

- The "management of securities or other property . . . ."

- Recommendations of a person who is also going to receive a fee or other compensation for providing any [investment] advice . . . ."

(29 CFR §2510.3-21 (a)(1)(i), (ii), and (iv)). The person providing the investment advice is someone that either acknowledges they are acting as an ERISA fiduciary or "renders the advice pursuant to a written or verbal agreement, arrangement or understanding that the advice is individualized to, or that such advice is specifically directed to, the advice recipient for consideration . . . ." (29 CFR §2510.3-21(f)(2)(i)).

The Proposed Rule does not distinguish between employee welfare plans and employee pension plans. A "plan" is defined as "any employee benefit plan described in section 3(3) of the Act and any plan described in section 4975(e)(1)(A) of the Code . . . ." (29 CFR §2510.3-21(f)(2)(i)). Plan assets are intended to include insurance contracts (*see:* Proposed Amendment to and Proposed Partial Revocation of PTE 84-24 which applies to insurance commissions and to the purchase with plan assets of an insurance contract). In addition, under longstanding ERISA rules, contributions by employees to fund health, disability, and insurance benefits, are considered plan assets and would therefore be subject to the Proposed Rule (*see:* 29 CFR §2510.3-102).

We do not believe this result was intended by the EBSA in promulgating the rule. If adopted as written, the rule would result in significant disruption of the welfare plan market and increase expenses to welfare plans and participants without providing commensurate benefits.

Differences Between Employee Welfare Plans and Employee Pension Plans

The primary goal of pension plans is to provide participants and beneficiaries with an accumulation of assets to fund their retirement needs. In today's workplace, American workers are much more likely to be responsible for their own financial well-being after retirement either through savings they accumulate through employer-sponsored defined contribution plans or personal savings vehicles like IRAs. Much of that savings is created by the worker contributing his or her wages to such vehicles. Ultimately, the worker bears the risk of loss whether due to changes in interest rates, poor performance in the capital markets, high fees or for some other reason. In response, the Department issued the Proposed Rule.

Employees who participate in employer-sponsored health and welfare plans do not bear risk in the same manner as individuals investing in pension plans. The payor of the benefits, whether the insurance company in an insured arrangement or the employer in a self-insured arrangement, is contractually obligated to pay the benefits due under the plan once the premiums are paid. Ultimately, it is the insurance company or employer that bears the risk that premiums collected are not sufficient to pay benefit claims and compensate service providers (i.e., the risk of loss).

We would also note that welfare plans and insurance coverage for such plans are subject to extensive oversight by state insurance departments and federal regulatory agencies. For example, the Affordable Care Act and other state and federal laws—such as the Health Insurance Portability and Accountability Act and Mental Health Parity and Addiction Equity Act—provide a comprehensive framework of requirements governing the coverage that must be provided to health plan participants and beneficiaries and the premiums that may be charged in connection with such benefits.

We appreciate that pension plan fiduciaries, plan participants, and IRA holders need assurances that the advice they receive in connection with their retirement investments is targeted to their needs. Entities providing investment advice with respect to pension and retirement funds should act in the best interests of the employers and employees they serve. However, interactions with employers and employees regarding health and disability income insurance are not, and should not, be considered "investment advice."

AHIP recommends that EBSA clarify that fiduciary investment advice does not include recommendations made to welfare plan fiduciaries, participants, and beneficiaries. Alternatively, the Proposed Rule should provide a specific carve-out for recommendations with respect to insurance contracts or self-funded plan arrangements for health, dental, vision, long-term care, disability income and supplemental coverage offered under welfare plans.

Treatment of Health Savings Accounts and Archer Medical Savings Accounts

The Proposed Rule and PTEs are applicable with respect to investment advice provided to IRAs and IRA owners. An "IRA" is defined in the Proposed Rule (45 CFR §2510.3-21(f)(2)(ii)) to include any trust account described in Code section 4975(e)(1)(B) through (F). That Code section addresses a variety of trust arrangements including HSAs and MSAs.[3] However, EBSA has recognized the differences between these non-ERISA arrangements and asked whether it is appropriate to treat HSAs and MSAs in the same manner as IRAs under the Proposed Rule.

We suggest that HSAs and MSAs are fundamentally different from IRAs and should not be subject to the investment advice restrictions in the Proposed Rule and PTEs. HSAs and MSAs are generally not considered by account holders as investment vehicles. These accounts are used by individuals as a way to accumulate funds in a tax-favored manner to pay for qualified health care expenses as specified in Code section 213(d). The funds are typically deposited in a bank or other custodial account and used to reimburse immediate medical expenses such as insurance cost sharing, prescription drug costs, and physician and hospital charges not covered by insurance or a group health plan.

A recent study of HSA balances conducted by AHIP and the American Bankers Association HSA Council looked at more than 1.4 million accounts that were open as of December 31, 2012. The survey indicated that the majority of accounts (61%) had a year-end balance of less than $1,000. Annual employer contributions into accounts averaged $1,142 and the average annual individual contribution was $2,337. Fifty-eight percent of accounts had withdrawals during the

[3] It should be noted that authorization for MSAs ended as of December 31, 2007. After that date no new accounts may be opened, but employers may continue existing MSAs for their employees. As a result, most MSAs have been converted to HSAs.

year with an average withdrawal of $2,081.[4] Contrast these amounts with average year-end IRA balances in 2012 of $81,660[5] and average 401(k) year-end balances in 2013 of $72,383.[6]

Similarly, the fees charged in connection with HSAs and MSAs and with respect to IRAs and 401(k) plans are substantially different. Generally, HSA and MSA fees are bank charges to open an account, process checks and debit card transactions, and perform similar functions. Fees for IRAs and 401(k) plans are substantially higher and are based on the dollar value of the account or a specific transaction such as a roll-over to a new account.

Typically, small balance HSAs and MSAs are held in bank deposit accounts. Although the accounts receive modest interest, the accounts are not intended as "investments" but as designed to preserve principal so that the accountholder's future medical expenses can be paid as expected. In a few limited cases – and only if the account balance exceeds a specific amount – are additional investment options made available.

In this regard, HSA providers are in one respect similar to 401k plan providers in that they may provide a platform of investments for the HSA account holder to select from (if he has a sufficient account balance). Contrary to a number of court rulings, the Department suggests that the mere offering of a platform of investment options is fiduciary advice.[7] That is particularly problematic because the Department expressly declined to extend the "Platform Carve-Out"[8] to HSAs or MSAs, so offering an HSA or MSA platform, even one that includes a broad array of investment options, could give rise to an unintended fiduciary relationship under the proposed regulation. Investment platform providers throughout the industry, who have no interest in or infrastructure to support fiduciary status, will have reconsider whether continuing to offer these

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[4] AHIP Center for Policy and Research and American Bankers Association HSA Council, *An Analysis of Health Savings Account Balances, Contributions, and Withdrawals in 2012,* July 2014.
[5] Employee Benefits Research Institute, *Individual Retirement Account Balances, Contributions, and Rollovers, 2012,* May 2014.
[6] Employee Benefits Research Institute, *401(k) Plan Asset Allocation, Account Balances, and Loan Activity in 2013,* December 2014.
[7] *See, e.g., Hecker v. Deere & Company*, 556 F.3d 575 (7th Cir. 2009) (Fidelity not a fiduciary where it merely "played a role" in the choice of investment options and plan sponsor retained ultimate authority over which options to include); *Leimkuehler v. American United Life Insurance Co.*, 2013 WL 1591450 (7th Cir. 2013) (standing alone, insurer's act of selecting funds and share classes for inclusion in investment options menu was not a "functional fiduciary" act where provider never exercised right to make substitutions in a way that could give rise to a claim).
[8] The Department has proposed a carve-out for the marketing and offering of a platform of investments in certain very narrow circumstances. Specifically, offering a platform will not constitute fiduciary advice when the platform of securities or other property is made available to the fiduciary of a participant-directed individual account plan employee benefit plan if (1) the platform is not individualized to the needs of the plan or participants, and (2) the provider discloses in writing that it is not undertaking to provide impartial investment advice or give advice in a fiduciary capacity.

platforms to HSAs and MSAs makes sense. It is not hard to predict a significant decline in the number and variety of platforms available to HSAs and MSAs. We urge the Department to avoid this unintended consequence by extending the Platform Carve-Out to all “plans” as defined in section (f)(3) of the Regulation, including HSAs and MSAs.

Given the differences between HSAs and MSAs and pension funds such as IRAs and 401(k) plans with respect to the account balances and fees and the manner in which the funds are utilized, we believe that HSAs and MSAs should not be subject to the Proposed Rule or PTEs. The cost of complying with the proposed fiduciary regulation and PTEs (the Best Interest Contract Exemption, in particular) will be borne, at least in part, by the accountholders and these costs far outweigh the hypothetical benefits of the added protections.

AHIP recommends that the Proposed Rule not apply to recommendations made to accountholders with respect to the establishment or investment of their HSAs and MSAs. As an alternative, the EBSA should extend the Proposed Rule’s platform selection monitoring carve-outs to investment platforms made available to HSA and MSA accountholders.

AHIP appreciates the opportunity to provide comments on the Proposed Rule and PTEs. Please feel free to contact me at (202) 778-3255 if you have any questions.

Sincerely,

Thomas J. Wilder

Thomas J. Wilder
Senior Counsel