America's Health
Insurance Plans

601 Pennsylvania Avenue, NW
South Building
Suite Five Hundred
Washington, DC 20004

202.778.3200
www.ahip.org

BlueCross BlueShield Association

An Association of Independent Blue Cross and Blue Shield Plans

1310 G Street, N.W.
Washington, D.C. 20005
202.942.1000
Fax 202.942.1125
www.BCBS.com

September 18, 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

Submitted electronically: e-ORI@dol.gov

Dear Sir or Madam:

The Blue Cross Blue Shield Association ("BCBSA") and America's Health Insurance Plans ("AHIP") appreciate the opportunity to provide supplemental comments with respect to the Department of Labor's (the "Department") notice of proposed rulemaking concerning the definition of the term "Fiduciary" in connection with investment advice published on April 20, 2015, 80 Fed. Reg. 21928 (the "Proposed Rule").

BCBSA is a national federation of 37 independent, community-based, and locally-operated Blue Cross Blue Shield Plans ("Plans") that collectively provide health care coverage for 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.

AHIP is the national association representing approximately 1,300 health insurance plans that provide coverage to more than 200 million Americans. AHIP's member health insurance plans offer a broad range of health insurance products in the commercial marketplace (including disability, long-term care, supplemental, and life insurance coverage) and also have demonstrated a strong commitment to participation in public programs.

AHIP and BCBSA would like to take this opportunity to follow up on a few key items related to health and welfare insurance and HSAs/Archer MSAs discussed during our joint testimony on August 10, 2015 at the public hearings.

Health and Welfare Plan Insurance Policies

We were pleased that during the hearing the Department publically stated that it does not believe that recommendations or advice to purchase insurance contracts funding an ERISA-covered health or welfare plan constitutes "investment advice" under the Proposed Rule (or under the Department's existing regulation). However, we continue to believe that there is sufficient ambiguity under the Proposed Rule which warrants action on the Department's part to clearly carve out such recommendations from the Proposed Rule.

Under the Proposed Rule, a person renders investment advice with respect to "other property of a plan" if he or she provides any "recommendation" as to "the advisability of acquiring, holding, disposing or exchanging securities or other property", if such recommendation is provided under an arrangement, understanding or agreement that it is individualized or specifically directed to the recipient. 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)). The Proposed Rule also does not define "other property of a plan" as used in the Proposed Rule. However, plan assets in other contexts are intended to include insurance contracts themselves that fund the plan (see section 401(b)(2)). In addition, under longstanding ERISA rules, participant 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).

During the hearing, Department officials stated that under the existing investment advice regulations recommendations to purchase health and welfare insurance contracts are not covered investment advice. Unfortunately, there is case law that substantiates our concerns. For example, one court held that a consultant was an advice fiduciary when recommending various types of insurance contracts, including those with "optometric and dental services." Brink v. DaLesio, 496 F. Supp. 1350, 1374 (D. Md. 1980), affirmed and reversed on other grounds, 667 F.2d 420 (4th Cir. 1981).

The Fifth Circuit's decision in American Federation of Unions Loc. 102 Health & Welfare Fund v. Equitable Life Assurance Society of the U.S. lends additional support to our concerns. In the American Federation case the court ruled that an agent and insurance company did not become fiduciaries when giving a health and welfare benefit fund advice to self-insure instead of purchasing a health insurance contract "because the advice was not given on a regular basis pursuant to a mutual agreement for a fee." 841 F.2d 658, 664 (5th Cir. 1988). The decision, however, indicates that nothing in the Department's existing fiduciary definition regulation clearly exempts health and welfare contract recommendation from the scope of the rule.

Since the Department believes that recommendations regarding health and welfare insurance contracts do not constitute investment advice, it is important to provide clear guidance to avoid needless litigation risk to insurers. The need for a carve-out is especially imperative given the robust new requirements that are imposed on persons that provide investment advice under the Proposed Rule (e.g., compliance with the BIC exemption, or revised exemption PTE 84-24).

Our view is that an appropriate carve-out would cover recommendations and advice to select any health and welfare insurance contract and that the carve-out must be unconditional (e.g., no disclosure and consent by the plan sponsor should be required). In addition, while we understand that the Department may believe there is not much confusion around this point, we request a firm carve-out, rather than interpretive language in the preamble, to be consistent with the carve-outs that address activities many in the industry have never believed constituted "investment advice" (e.g., offering a broad, non-customized "platform" of investment options as never been viewed as investment advice).

As mentioned in our testimony, we continue to believe that the cleanest approach is to simply exclude health and welfare plans entirely from the Proposed Rule by carving out any plan described in section 3(1) of the Act. However, if the Department is not willing to provide such relief (as it did under the section 408(b)(2) regulations), we suggest a clear carve out for insurance contracts issued to such plans. As such, we recommend the adoption of the following specific carve-out language.

Proposed "carve-out" language for 29 CFR §2510.3-21(b):

Insurance policies providing benefits to health or welfare plans. The person provides advice with respect to an insurance policy or contract that provides benefits in connection with a health or welfare benefit plan as defined by section 3(1) of the Act.

Health Savings Accounts and Archer Medical Savings Accounts

HSAs and Archer MSAs are explicitly covered by the Proposed Rule even though they are clearly not retirement accounts. Instead, HSAs and Archer MSAs are tax-advantaged accounts that may be used to fund medical cost sharing and other eligible medical expenses not covered by a high deductible health plan. Amounts are usually held in bank accounts so that assets are preserved and accumulate tax free to pay current medical costs. Generally, only if an account's assets exceed a few thousand dollars are amounts available to invest in a limited array of mutual funds. Otherwise, amounts are held in bank deposit accounts or money market funds. The average HSA account balance at the end of 2014 was $1,933. Average account distributions

were $1,951 and 80% of HSAs that received a contribution also incurred a distribution. Only 6% of HSAs have investment options.[1]

Nonetheless, the Proposed Rule specifically includes HSAs and Archer MSAs in its definition of covered plans. As such, virtually any information provided to an accountholder could constitute fiduciary advice. In addition, an HSA or Archer MSA custodian such as a bank may be a fiduciary simply by making investments available because the Proposed Rule's platform carve-out does not extend to HSAs and Archer MSAs (and IRAs generally). This is inappropriate given the limited investment opportunities available through these accounts, which are not retirement vehicles in any way.

Any rulemaking by the Department should recognize that HSAs and Archer MSAs are not retirement vehicles and that providing information to individuals how these accounts operate is not "investment advice". Otherwise, health insurers and financial institutions that offer HSAs or Archer MSAs will likely provide less information to consumers about how the accounts and their related high deductible health plans work together. Less information provided to consumers in today's dynamic health care market place will not foster the Department's policy goal of regulating conflicts of interest by financial advisers. AHIP and BCBSA continue to believe that a complete carve-out for HSAs and Archer MSAs is warranted since these arrangements are clearly not retirement vehicles.

However, if the Department does not accept this recommendation, we suggest that the Department address these concerns by expanding the platform carve-out and clarifying the application of the investment education carve-out.

1. **The Proposed Rule's platform carve-out should be expanded to cover investment options offered by HSA providers.**

We believe a service provider offering a menu of pre-selected investment options in connection with an HSA or Archer MSA for use by either an employer or individual account owners should be subject to relief given the nature of these accounts as non-retirement vehicles. The platform carve-out should be amended as follows:

Proposed language for 29 CFR §2510.3-21(b):

(3) Platform providers.

[1] Employee Benefits Research Institute, Health Savings Account Balances, Contributions, Distributions, and Other Vital Statistics, 2014, July 2015.

The person merely markets and makes available to an employee benefit plan (as described in section 3(3) of the Act), without regard to the individualized needs of the plan, its participants, or beneficiaries, securities or other property through a platform or similar mechanism from which a plan fiduciary may select or monitor investment alternatives, including qualified default investment alternatives, into which plan participants or beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts, if the person discloses in writing to the plan fiduciary that the person is not undertaking to provide impartial investment advice or to give advice in a fiduciary capacity.

(b) The person merely markets and makes available to a plan (as described in section 4975(e)(1)(D) and (E) of the Code) a menu of pre-selected investment options without regard to the individualized needs of the plan, its participants, or beneficiaries, securities or other property through a platform or similar mechanism, if the person discloses in writing to the plan fiduciary that the person is not undertaking to provide impartial investment advice or to give advice in a fiduciary capacity.

2. Discussion and examples should be added showing the education carve-out covers advice by HSA and Archer MSA providers.

While we believe that the education carve-out covers the provision of certain educational information regarding HSAs and Archer MSAs by the reason of the definition of IRA, including preamble language discussing the application of these carve-outs to fact patterns involving such accounts would provide greater certainty to health plans and account custodians and foster a flow of relevant information to consumers.

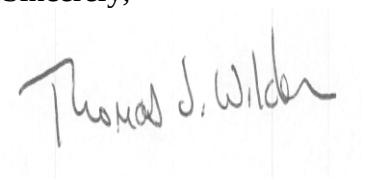
Proposed preamble language:

In response to comments, the Department wishes to confirm that HSAs and Archer MSAs are covered by the investment education carve-out. For example, the investment education carve-out would cover actions by an HSA custodian or health insurer in describing the function and interaction of an HSA with a high-deductible health plan. Permitted information would include the importance of making contributions to the HSA, what are "qualified medical expenses", how claims can be submitted and reimbursed by the HSA, how the investment features of the HSA work, what investment options are available, and asset allocation strategies for the HSA. This information could be provided via call centers, brochures, and web-based tools provided by the health insurer, as well as information provided by insurance agents and brokers.

* * *

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 or 202-626-8651 or Tom Wilder at twilder@ahip.org or 202-778-3255.

Sincerely,



Thomas J. Wilder
Senior Counsel
America's Health Insurance Plans

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