



July 21, 2015

The Honorable Phyllis C. Borzi  
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: Definition of the Term “Fiduciary;” Conflict of Interest Rule – Retirement Investment Advice; Proposed Rule; (RIN 1210-AB32)**

Submitted Electronically: Federal eRulemaking Portal - [www.regulations.gov](http://www.regulations.gov)

Dear Assistant Secretary Borzi:

United Concordia Companies, Inc. (“United Concordia”) appreciates the opportunity to offer comments in response 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. United Concordia is one of the nation’s largest dental insurers, serving more than 7 million members worldwide. We operate eleven subsidiary companies licensed to transact health insurance and/or dental managed care in all fifty states and the District of Columbia.

United Concordia and its subsidiary companies provide dental insurance coverage to and administrative services for employee health and welfare plans governed by the Employee Retirement Income Security Act (ERISA). As currently written, we are concerned that the Proposed Rule could impact the arrangements United Concordia has with plan sponsors of employee health and welfare plans and severely limit its ability to effectively service current and future customers.

As indicated in the Department’s summary to the Proposed Rule, the Department’s purpose in revising the definition of when a person will become a fiduciary by reason of the provision of investment advice under ERISA is to address dramatic changes and complexities in the market for retirement advice that have surfaced since the Department’s promulgation of rules in 1975. As a result, the Department is concerned with the increased potential for conflicts of interest with respect to investment advice given to employee benefit plans, plan fiduciaries, plan participants and beneficiaries, Individual Retirement Accounts (IRAs), and IRA account holders.

While we appreciate the Department’s objectives in revising the investment advice fiduciary definition, we share the concerns of others in the insurance industry, including the National Association of Dental Plans (NADP), America’s Health Insurance Plans (AHIP) and the Blue Cross Blue Shield Association (BCBSA), that the Proposed Rule would substantially expand the

circumstances in which persons providing recommendations to plan sponsors, employers or plan participants are considered “investment advice” fiduciaries and broadly apply to a wide range of entities and individuals that market insurance products or provide administrative services to employee health and welfare plans.

## **Analysis of Proposed Rule and Application to Employee Health and Welfare Plans**

The Proposed Rule modifies the definition of “investment advice fiduciary” to eliminate the requirement that the advice must be provided on a “regular basis” and that it will be relied on as a “primary basis” for the recipient’s decision-making (29 CFR § 2510.3-21(c)(1)(ii)(b)). The new definition under the Proposed Rule has been broadly written to indicate that fiduciary investment advice would include “recommendations” as to “(i)...the advisability of acquiring, holding, disposing or exchanging securities or *other property*... .”; “(ii)...the management of securities or *other property* . . .”; “(iv)...a person who is also going to receive a fee or other compensation for providing any of the advice described in paragraphs (i) through (iii) . . . .” (Proposed Rule at 29 CFR §2510.3-21 (a)(1)(i), (ii), and (iv)). Under current law, a dental insurance policy would be considered “other property” and contributions made by employees to fund health and dental benefits would similarly be considered assets of an employee health and welfare plan, making them subject to the Proposed Rule.

A “recommendation” is defined under the Proposed Rule as “...a communication that, based on its content, context, and presentation, would reasonably be viewed as a *suggestion* that the advice recipient engage in or refrain from taking a particular course of action.” (Proposed Rule at 29 CFR §2510.3-21(f)). Dental carriers both employ and contract with agents who, in addition to providing invaluable expertise to a plan sponsor regarding dental plan options, may ultimately *suggest* that certain options would best fit the needs of the plan sponsor’s participants.

Although the Department’s stated purpose for the Proposed Rule appears to be directed at investment advice related to retirement plans and IRAs that hold assets that must be invested, the Proposed Rule does not distinguish between employee health and 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 . . . .” (Proposed Rule at 29 CFR §2510.3-21(f)(2)(i)). Without making a clear distinction, the fiduciary requirements of the Proposed Rule can be read as applicable to “investment advice” provided to employee health and welfare plans.

## **Impact of Proposed Rule to Employee Health and Welfare Plans**

We join other commenters from the insurance industry in urging that the rule distinguish employee health and welfare plans from employee pension plans in structure and purpose and clearly exempt health and welfare plans from the Proposed Rule. Application of the Proposed Rule to health and welfare plans will adversely impact the information and services available to employers that purchase dental coverage for their employees. As currently written, the Proposed Rule will apply to any recommendation or suggestion made regarding purchase of a dental insurance contract by a sponsor of any health and welfare plan, making that person a fiduciary, even if that person is clearly operating in an educational, marketing or sales capacity.

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Application of the Proposed Rule in this manner will also impact issuer obligations currently regulated by the Affordable Care Act and/or state law, under which dental plans are already subject to extensive oversight by state insurance departments and federal regulatory agencies. These laws already provide comprehensive requirements governing marketing practices, the coverage that must be provided to health and welfare plan participants and beneficiaries, the premiums that may be charged in connection with such benefits and the transparency of this information to the consumer.

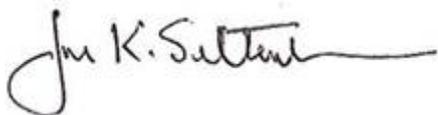
In addition, agents, brokers and consultants who provide recommendations to employers regarding dental insurance policies are much more likely to be considered “investment advice fiduciaries” under the Proposed Rule than they are under current law. There could also be negative impacts on the development of dental insurance plans through private exchanges, and other similar tools made available to consumers shopping for dental insurance coverage. If the Proposed Rule is finalized in its current form, the transparent provision of information to consumers shopping for insurance through these tools would be significantly impacted.

## **Recommendation**

To avoid the negative impact of the Proposed Rule to the insurance industry and its ability to provide information and services to consumers, the Department should clarify that the Final Rule is not applicable to employee health and welfare plans. Alternatively, the Proposed Rule should provide a carve-out for dental and other insurance contracts and for administrative service arrangements for dental and other related insurance products.

We appreciate the opportunity to comment and your consideration of our recommendations regarding the Proposed Rule. Please let me know if I can provide further clarification.

Sincerely,



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