March 30, 2017

Edward Hugler
Acting Secretary
Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Submitted via the Federal Rulemaking Portal **www.regulations.gov**

Re: RIN 1210-AB79 — Rule on the Definition of Term Fiduciary; Conflict of Interest Rule-Retirement Investment

Dear Mr. Hugler:

I am writing on behalf of the National Association of Health Underwriters (NAHU), a professional association representing more than 100,000 licensed health insurance agents, brokers, general agents, consultants and employee benefit specialists nationally. We are writing about the request for information about whether the final fiduciary rule may adversely affect the ability of Americans to gain access to retirement information and financial advice, as well as for information about the policy implications of this regulation, which was published in Volume 82, number 40 of the *Federal Register* on March 2, 2017. This letter is intended to supplement our March 16 letter in support of a delay of the applicability date of this regulation by 60 days to June 9, 2017.

The members of NAHU work on a daily basis to help millions of individuals and employers purchase, administer and utilize health insurance coverage, including the increasingly popular employer group benefit option of qualified high-deductible health plan (HDHP) coverage coupled with a Health Savings Account (HSA). Our association believes the final fiduciary regulation inappropriately treats HSAs and Archer Medical Savings Accounts (MSAs) in a manner similar to Individual Retirement Accounts (IRAs) both in terms coverage and applicable carve-outs. Unless it is rescinded or amended, NAHU believes this rule will have a chilling impact on employee access to HSAs, and will greatly diminish the access both employers and employees will have to the advice of licensed health insurance agents and brokers when it comes to HSA plan establishment. NAHU members believe that the provisions of the final fiduciary rule that are applicable to HSAs and MSAs should be stricken in order to protect all health insurance consumers' access to these popular and cost-saving health coverage options. However, if that is not possible, NAHU believes that for the employer-based HSA marketplace to ultimately continue, at minimum additional guidance about the applicability of this regulation to employers that offer HSA options to their employees and to their licensed advisors is sorely needed.

By expanding the definition of plan fiduciary to cover not only service providers who assist employers and employees with IRA options but also those who assist with HSAs and MSAs, including providing advice on a one-time basis, this regulation creates unprecedented new compliance responsibilities and liabilities for both employers and licensed health insurance agents and brokers. NAHU is very concerned that, once this rule is fully applicable, employers and health insurance agents and brokers will be unwilling to accept this new liability and will instead simply eliminate group HSA access for millions of Americans in favor of other benefit options that may be less advantageous to employees. Agents who do continue to help employers establish group plans with qualified

HDHP coverage that can be combined with a HSA will likely have to severely curtail the assistance they provide to employers and to employees. Instead of helping with account establishment, they could be limited to just providing very general education information about HSAs, which could greatly reduce the number of employees who actually create and fund accounts.

NAHU believes that the DOL has grounds to remove the HSA and MSA provisions of the rule because it is really inappropriate to treat these tax-preferred sources of out-of-pocket medical care expense funding in the same manner as legitimate retirement investment vehicles. HSAs and IRAs not are similar enough products for the Department of Labor to regulate their service providers in the same manner. While HSA funds can be used to fund medical costs and other expenses in retirement, they are typically low-balance accounts used and viewed by employees as a shield against high out-of-pocket costs in their current-year medical plans. According to the Employee Benefit Research Institute, employee balances in HSAs averaged $1,844 at the end of 2015, with the average balance ranging from $759 for an account owner under 25 to just $3,623 for individuals at retirement age of 65 and older. Eighty percent of Health Savings Account holders took account distributions in 2015 for medical expenses, with the average amount of the distribution being $1,748, and only three percent of all HSA account holders had any invested assets beyond cash.[1] All of this data supports the market observations of our nation's licensed insurance brokers that Americans do not typically view their HSA funds as part of a long-term retirement investment strategy, but rather as a source of funds to cover current and short-term medical costs. As such, the Department of Labor should not treat HSAs and MSAs in the same manner as IRAs with regard to conflict of interest and fiduciary standards.

Over the past seven years, implementation of the Patient Protection and Affordable Care Act (ACA) has made group health plan administration significantly more expensive and complicated for employers and their licensed benefit advisors. Furthermore, health reform has changed employer plan design, placing an increased emphasis on high-deductible plan choices for group health plan participants. Coupling a qualified high-deductible plan with an HSA is currently a very popular option among both employers and employees to offset high employee out-of-pocket costs and encourage responsible consumerism. According to America's Health Insurance Plans (AHIP) survey data, over 20 million Americans were enrolled in qualified high-deductible health plans paired with an HSA via an employer group benefit arrangement in 2016. Since the ACA was passed in 2010, this market segment has doubled in volume.[2] Due to the coming implementation of the health plan excise tax in 2020, until the finalization of the fiduciary rule, most NAHU members predicted that the inclusion of qualified high-deductible plan offerings in group health plan arrangements would continue to markedly increase. But under the current regulatory environment caused by the changed fiduciary standards, HSAs will become a much less desirable option for employers to implement and agents and brokers to support.

Unless the Department of Labor amends the fiduciary rule with regard to HSAs and MSAs, NAHU believes that employers and licensed agents and brokers will be inclined to eschew the HSA option for employees in favor of

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[1] Employee Benefit Research Institute, (November 2016). "HSA Balances, Contributions, Distributions and Other Vital Statistics, 2015—Estimates from the EBRI HSA Database" EBRI Issue Brief #427. Retrieved from www.ebri.org/pdf/briefspdf/EBRI_IB_427.Nov16.HSAs.pdf.

[2] America's Health Insurance Plans. (February 2017) "2016 Survey of Health Saving Accounts – High-Deductible Health Plans" Retrieved from: www.ahip.org/wp-content/uploads/2017/02/2016_HSASurvey_Draft_2.14.17.pdf

other benefit designs, due to the new complexity and liability that will be associated with HSAs. For employers, the implementation of this regulation will make it much more complicated to ascertain whether financial service providers meet the standard of a plan fiduciary by expanding the qualifying test in three ways. In addition, by expanding the scope of applicable products to include HSAs and MSAs for the first time, the rule will require employers to determine whether their group health insurance broker met the test. Then employers will have to ensure that their broker meets fiduciary liability standards should their service provider qualify. Given all of the other requirements that employers currently need to follow – including complicated plan rules, employer shared responsibility requirements, substantial employer reporting burdens and the looming excise tax – no group plan sponsor needs to add additional complications to their benefit offerings. Thus, the fiduciary regulation incents employers to drop their HSA-compatible coverage options and group HSA support.

For most licensed health insurance agents and brokers who routinely sell and service employer group qualified high-deductible health plan products that can be combined with HSAs, when this regulation becomes applicable, it will expand their potential liability into completely new territory. While some health insurance agents and brokers also work in the traditional group retirement benefit market, many do not sell or service retirement plan products and are therefore unfamiliar with retirement account fiduciary standards. For these agents, the rule could require completely different business standards, interactions, contract structures and payment methodologies with their clients.

Based on NAHU's analysis of the regulation, it does seem that many brokers who sell and service HSA-compatible group health insurance products and facilitate related HSA establishment and contributions now might be able to avoid triggering fiduciary responsibility by limiting the amount of information and education they give to employees about HSAs. However, the triggering standard with regard to the kinds of education that can be provided to plan sponsors and participants is vague and confusing, and many licensed agents will be unwilling to accept the potential risk. Further, if fiduciary liability is triggered, then so are conflict-of-interest standards, compensation limitations and the "best interest contract" exemption, all of which would dramatically affect a health insurance broker's current business and payment norms.

Given all of the additional responsibility and compensation changes and challenges licensed health insurance agents have had to endure over the past seven years of health-reform implementation, we know that our members have no interest in increasing their potential exposure or further limiting their compensation for providing employers and employees with service and advice. Instead, we believe that application of this rule as written will force agents and brokers to either consider other product options for their clients or severely curtail the amount of HSA support they provide to employer clients and their employees with regard to account establishment.

Given the realities of the new fiduciary rule, if it is left unchanged, we predict that many employers will either eliminate the account-based component (and associated employer contributions) of their high-deductible offerings or favor Health Reimbursement Arrangements (HRAs) to help employees offset higher out-of-pocket costs, particularly if the health reform excise tax is implemented in 2020, as scheduled. While HRAs do have numerous advantages for employers and can help decrease high cost-sharing responsibility for employer plan participants, HRAs have far fewer direct benefits to employees because the funds are purely owned and controlled by the employer. Therefore, there are no savings benefits or tax advantages for the employee and there are fewer general market benefits relative to medical care spending because the employee has little to no incentive to practice responsible consumerism. If the regulation is implemented as is, NAHU believes the end result will not be increased investment advice protections for HSA holders, but instead a loss of HSA access and support for millions of American employer plan participants.

To preserve the group HSA marketplace and protect employee access to the HSA option and its many benefits, NAHU urges you to exclude HSAs and MSAs from the scope of the fiduciary regulation. NAHU sincerely appreciates the opportunity to provide these comments on the adverse impact the fiduciary regulation will have on the HSA marketplace and the ability of Americans to gain access to information and financial advice about HSAs. If you have any questions, or if NAHU can be of further assistance to you, please feel free to contact me at 202-595-0787 or jtrautwein@nahu.org.

Sincerely,

Janet Trautwein
Executive Vice President and CEO
National Association of Health Underwriters