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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**

Cigna Corporation, together with its subsidiaries (either individually or collectively referred to as "Cigna"), is a global health services organization dedicated to helping people improve their health, well-being and sense of security. Our subsidiaries are major providers of medical, dental, disability, life and accident insurance and related products and services. Cigna's Global Health Care business segment provides health care, wellness and preventive solutions to individuals and employers around the world and we ended 2014 with 14.5 million global medical customers. As a leading provider of health insurance services, Cigna has a keen interest in developments impacting our products. Cigna provides insurance coverage to and administrative services for employee welfare plans governed by the Employee Retirement Income Security Act (ERISA). The insurance products and services we offer include coverage for major medical, dental, vision, supplemental, and disability income benefits. In addition, we offer custodial services in connection with health savings accounts (HSAs). All of these arrangements could arguably be subject to the Proposed Rule and PTEs as currently written. Accordingly, Cigna 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.

Employee Welfare Plans

We believe employee welfare plans differ significantly from employee pension plans in structure and purpose and that the Proposed Rule should not, therefore, be applied to welfare plans.

The Proposed Rule attempts to reformulate the definition of "fiduciary" to encompass numerous types of sales activities, which may be non-fiduciary in nature under existing law. The current requirement to determine fiduciary adviser status generally excludes sales activities by limiting the scope of fiduciary activities to those situations where a person, for a fee:

(1) renders advice to a plan as to the value of securities or other property, or makes recommendations as to the advisability of investing in, purchasing, or selling securities or other property;
(2) on a regular basis;
(3) pursuant to a mutual understanding
(4) that such advice is considered the primary basis for investment decisions; and that
(5) the advice will be individualized to the plan.[1]

These are acceptable criteria as not all sales activities are conducted on a "regular basis," have a "mutual understanding" as to recommendations in a sales context, or provide individualized recommendations to the needs of the customer. The Proposed Rule eliminates all but the first prong of the current test and defines "investment advice" as:

1) a recommendation as to the advisability of acquiring, holding, disposing or exchanging securities <u>or other property</u>, including recommendations to receive a distribution of benefits or roll over assets from a plan or IRA;
2) a recommendation as to the management of securities <u>or other property</u>, including recommendations as to the management of assets to be rolled over to or distributed from an IRA;
3) an appraisal or fairness opinion concerning the value of securities <u>or other property</u> if made in connection with a specific transaction involving the plan or IRA; and
4) a recommendation of a person who will also receive a fee or other compensation for providing any of the three Covered Advice categories listed above.

A "recommendation" is broadly defined 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.".

It is our understanding that the proposed Regulation is aimed at employee pension plans and is not intended to extend the advice fiduciary rules to entities/ individuals involved in the marketing of insurance policies that do not include investment features or that provide administrative services to employee welfare plans. However, the Proposed Rule does not distinguish between employee welfare plans and employee pension plans. Given the breadth of the language in the Proposed Rule (especially the undefined reference to "other property") we are concerned that many routine "sales" activities in connection with employee welfare plans, which would necessarily involve some form of purchasing "recommendation," could be deemed advice fiduciary activities under the Proposed Rule.

For instance, agents or brokers ("agents") who recommend to an employer that they purchase a particular group medical, life, disability , dental, vision or accident policy could potentially be considered "advice fiduciaries" under the Proposed Rule. If an agent or broker is an advice fiduciary in advising customers regarding insurance policies available to them, ERISA's conflict rules would then prohibit the agent from receiving a customary commission unless all of the conditions of a DOL exemption are satisfied. Insurers would cases paying such commissions to avoid liability for participating in the fiduciary breach.

Similarly, under the Proposed Rule, an insurer's own marketing activities through its field staff or otherwise could be considered "fiduciary." For example, marketing materials or responses to requests for proposal for group disability or health insurance might be construed as "suggestions" that the prospective customer choose the insurer's product. If the insurer is considered an advice fiduciary, the sale of an insurance policy itself (and receipt of premium) would be prohibited unless the insurer complied with an available exemption. (In addition, if compensation to field sales employees is based on sales, the same exemption may be required for them.)

Because of the different purposes and structures of employee welfare plans and employee pension plans, we believe it is inappropriate to apply the same investment fiduciary requirements to both types of arrangements. We appreciate that pension plan fiduciaries and plan participants and beneficiaries need assurances that the advice they receive in connection with retirement funding is targeted to their needs and that the investment advisor is acting in the best interest of individual accountholders; however, it is also clear that the interactions between insurance companies, agents, brokers, and third-party administrators and welfare plans, plan fiduciaries, and plan participants and beneficiaries do not involve investment advice. As a result, the plan or product choices made by plan participants and beneficiaries should not be subject to the same requirements as the decisions made in choosing pension plan options.

Retirement plans and IRAs often accumulate assets over a period of 20 to 30 years or longer. The investment returns, net of fees, on such assets is crucial to providing retirement security to millions of Americans. As the Department has noted in the Proposal, over long periods of investment, the amount of available retirement savings – the benefit itself – could be adversely affected by high cost investments or poor investment recommendations. As such, impartial investment advice is crucial for such plans and the Department's focus on the transparency of the fees associated with retirement plan investments, and potential conflicts of interest by financial advisers, makes policy sense (we are not endorsing details of the Proposal with respect to retirement plans, but we do recognize the policy concerns driving the Proposal).

Group insurance policies are issued on a yearly basis for a set price. They are not investment contracts in any way. In the case of a typical group insurance policy that funds a health and welfare plan, the employer/plan sponsor (acting as an ERISA fiduciary) knows the price and benefits associated with the plan at the point of sale. Comparison shopping is fairly straightforward and is typically conducted with the assistance of a broker or consultant who may be providing education and information to the employer/plan sponsor in connection with the sale of the contract. Unlike investments, here is no reduction in benefits provided under the group insurance policy based on the payment of commissions to brokers/consultants (which are disclosed on the schedule A of the Form 5500).

Cigna is deeply concerned that the Proposal may unintentionally, but adversely, affect its routine client educational, sales and support activities, as well as the activities of independent brokers and consultants in connection with the offering of group insurance policies to fund health and welfare plans. If the Proposal is adopted in its current form, insurers and brokers/consultants will likely restrict the flow of information provided to consumers in connection with insurance products, and that in the end consumers will be less informed. The timing could not be worse – consumers need access to more information rather than less due to the rapid changes in the insurance markets brought on by the ACA's ongoing implementation.

But these concerns are simply not present for health and welfare plans funded by insurance contracts. Nor are they present for HSAs.

Health Savings Accounts

HSAs do not serve as long-term investment vehicles. The vast majority of HSA assets are held in short-term bank deposit accounts and are used to pay current year medical expenses. Annual HSA contributions are generally well below the health plan's annual deductible. This structure encourages the type of consumerism that high deductible plans are designed to encourage. The majority of consumers carry very small balances (or no balances) over from year to year. Indeed, the Department has recognized the truly distinct nature of HSAs as compared to IRAs when it excluded HSAs from ERISA's reach when issuing FAB 2004-1 and FAB 2006-2.

With respect to HSAs, it appears that Cigna would have to rely on the Proposal's Best Interest Contract ("BIC") exemption since there is no carve-out for HSAs. But the BIC exemption is extremely complex and the compliance costs associated with the exemption would be prohibitive for the small amount of HSA assets that held in HSAs. The fact that the BIC exemption, through its creation of a best interest contractual standard, would authorize private litigation against insurers for offering HSAs is alone enough to discourage them from relying on the exemption. The result will be a restriction in information provided to HSA accountholders and employers. Needless to say, a less informed health care consumer runs counter to the basic purpose of consumer driven health care of which HSAs are an integral part.

Recommendations

We understand that the Proposal is intended to update the Department's 40-year old regulation defining what constitutes "investment advice" under ERISA's definition of fiduciary. The Department's clear goal is to ensure that advice given by financial advisers to retirement plan investors (including IRAs) is in the best interest of the investor and to ensure transparency and mitigation of potential conflicts of interest that financial advisers may have. However, Cigna is concerned that the Proposal as drafted sweeps too broadly and that our sale of group insurance policies to fund health and welfare plans, as well as our offering of HSAs, could be adversely affect by the Proposal. We believe that the Proposal's potential negative effects may be unintended and, as such, we seek the following important changes:

- First, we believe that health and welfare plans are significantly different from retirement plans in structure and purpose. As such, the Proposal should be modified to include a "carve-out" for group insurance policies that are issued to fund ERISA-covered health and welfare plans. We believe that there should be no conditions placed on the carve-out (i.e., no specific disclosure and consent requirements). In providing such treatment, the Department would be acting consistent with its exclusion of health and welfare plans when it issued final service provider disclosure regulations under section 408(b)(2) of ERISA just three years ago.

- Second, we believe that HSAs are fundamentally different than IRAs and the Department should carve-out HSAs from the Proposal. In doing so, the Department would be acting consistent with its earlier issuance of FAB 2004-01 and FAB 2006-2, which excluded HSAs from ERISA's reach, even where the employer contributes to the HSA and generally endorses the HSA. If the Department does not carve out HSAs entirely, we recommend that the Department carve-out HSAs with balances below [$5,000], since small HSA accounts in particular should not be treated as investment arrangements. In addition, in this case the Department should extend the platform carve-out to HSA providers and provide examples under the education carve-out that illustrates its application to HSAs.

Absent such a carve-out there will less information provided by insurers and agents to employers and individuals, harming consumers.
Thank you for the opportunity to comment on the Proposal.

Very truly yours,

Edward P. Potanka
Vice-President and Chief Counsel