July 19, 2017

Timothy D. Hauser
Deputy Assistant Secretary for Program Operations
Employee Benefits Security Administration
United States Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

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

RE: EBSA-2007-0004; RIN-1210-AB82

Dear Mr. Hauser:

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 benefits specialists. We are writing in response to your request for information regarding the fiduciary rule and prohibited contract exemptions published in Volume 82, Number 128 of the *Federal Register* on July 6, 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) like Individual Retirement Accounts (IRAs) both in terms of coverage and applicable carve-outs. NAHU has concerns that the final fiduciary rule will significantly diminish employee access to HSAs over the next few years, as well as limit the ability both employers and employees will have to the seek the advice of licensed health insurance agents and brokers when it comes to HSA plan establishment. As such, our response to this request for information focuses on the impact the fiduciary rule is having on the employer-based HSA marketplace. As you requested, we have grouped our letter by topic to correspond with the applicable questions outlined in your solicitation of public comments.

Question 1—Would a delay in the January 1, 2018, applicability date of certain fundamental rule provisions reduce the burdens on financial services providers and benefit retirement investors by allowing for more efficient implementation responsive to market developments?

NAHU strongly supports an additional delay in the applicability date of any provisions of this significant regulation. The lack of information from the Department of Labor (DOL) about how this rule will be applied to HSA brokers specifically has been very concerning to health insurance agents and brokers and their employer clients that offer HSA-compatible health insurance coverage as part of their group benefit offerings and has complicated implementation.

This regulation expanded potential compliance liability into entirely new territory for most licensed health insurance agents and brokers who routinely sell and service employer group qualified high-deductible health plan products that are HSA-compatible. 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 at all. These agents are therefore unfamiliar with retirement account fiduciary standards, and this rule may require a complete reworking of business practices, including client interactions, contract structures and payment methodologies. The lack of certainty about the regulation to date has just created a paralyzing climate for HSA advisors and their employer and employee clients. More time to adjust would be very beneficial.

In addition to allowing more compliance time, NAHU urges the DOL to develop detailed guidance about how this regulation will impact the HSA marketplace. The information the DOL prepares should target both employers that offer their employees assistance in creating an HSA to go along with employer-sponsored qualified HDHP coverage options, as well as the licensed insurance professionals engaged by companies to advise employees on HSA (and possibly MSA) establishment. The content should help employers and licensed advisors determine exactly how they can provide service to employers and individual employees establishing HSAs without triggering the standard of a plan fiduciary, perhaps in the form of a series of frequently asked questions with detailed examples. Other topics additional DOL guidance should cover include what, if any, level of financial remuneration can trigger the fiduciary standards and the relationship of this rule to health plan fiduciary standards required by ERISA. Finally, the development of DOL model disclosure documents for HSA producers to use with clients, if needed, would be constructive.

Question 2—What has the regulated community done to comply with the Rule and PTEs to date, particularly including the period since the June 9, 2017, applicability date?

Since the regulation revising the definition of plan fiduciary and creating a new conflict of interest standard became final in April 2016, the DOL has been formally and informally promising all of those involved in the group HSA marketplace that additional guidance would be forthcoming and would outline exactly how the regulation would be applied relative to HSAs. Unfortunately, to date, no fiduciary guidance has been issued by DOL that is unique to the HSA marketplace. The lack of information has left employers and their licensed insurance producers very uncertain and has hindered the ability of brokers to design effective agency-compliance mechanisms that they believe will serve them well into the future.

Based on NAHU's analysis of the rule, it does seem that many brokers who sell and service HSA-compatible group health insurance products and facilitate related HSA establishment and contributions 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 concerning the kinds of education that can be provided to plan sponsors and participants is vague and confusing. Any employer offering a group HSA option in conjunction with HDHP coverage would be liable for making the determination if the fiduciary standard was triggered using this vague and confusing regulatory language.

Right now, most brokers are evaluating their business practices and trying to set up bright lines for their employees and licensed advisors to use as guidelines to ensure that the information that they provide to clients falls into the realm of providing education rather than direct recommendations. However, without precise information from the DOL about where those lines are and enforcement practices, most brokers feel like they really must cut back on or eliminate client support regarding HSAs for the plan year ahead.

At this time, many licensed agents and their employer clients are expressing great hesitancy about accepting the potential risk associated with offering group HSA options in 2018, and are instead looking into consumer-directed options requiring less compliance responsibility and liability, like Health Reimbursement Arrangements, even though those options might be less financially advantageous for employees.

Question 15—Should there be an amendment to the Rule or streamlined exemption for particular classes of investment transactions involving bank deposit products and HSAs? If so, what conditions should apply, and should the conditions differ from the BIC Exemption?

NAHU members believe that the DOL should strike all of the provisions of the final fiduciary rule that apply to HSAs and MSAs to protect all health insurance consumers' access to these popular and cost-saving health coverage options. 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 entirely applicable, employers and health insurance agents and brokers will be unwilling to accept this new liability and will instead 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 with HSA options will likely have to severely curtail the assistance they provide to employers and employees. Instead of helping with account establishment directly, they may be limited to providing very general education information about HSAs, which could substantially reduce the number of employees who create and fund accounts.

NAHU believes that the DOL has grounds to remove the HSA and MSA provisions of the rule because it is 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 are not similar enough products for the DOL to regulate their service providers in the same way. 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 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

[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.

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 concerning 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 desirable option for 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 looming effective date 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 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 concerning HSAs and MSAs, NAHU believes that companies and licensed agents and brokers will be inclined to eschew the HSA option for employees in favor of other benefit designs, due to the new complexity and liability 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. Also, 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 businesses 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 and HSAs, when this regulation becomes applicable, it will expand their potential liability into entirely 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 is about to require completely different business standards, interactions, contract structures and payment methodologies with their clients.

[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

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 concerning 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 about account establishment.

Given the realities of the new fiduciary rule, we predict that many companies will either eliminate the account-based component (and associated employer contributions) of their high-deductible offerings or switch to Health Reimbursement Arrangements to help employees offset higher out-of-pocket costs if it is left unchanged. This phenomenon will be particularly true 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 company. 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. NAHU believes the 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. However, if that is not possible, NAHU believes that for the employer-based HSA marketplace to ultimately continue, the DOL should issue additional regulatory guidance clarifying that the following type of advisory activity concerning HSAs would not trigger the fiduciary standard:

- If a health insurance agent or broker merely provides consumers with a list of various HSA vendor options that work with the HDHP options under consideration. Explaining what an HSA is, how it works and the differences between the HSA providers available to the client should also not trigger the standard, as long as the advisor is not recommending one vendor over another.

- When a health insurance agent or broker is providing information or advice about a health plan with an HSA option to a consumer and the medical insurance carrier has already contracted with a particular HSA vendor to service that plan. The agent or broker should not be held to the fiduciary standard because they would not be making a real “recommendation” for the vendor since the health insurance carrier already determined that vendor via their contract.

- When a health insurance agent or broker is discussing health plans with HSAs as an option for a consumer, the fiduciary standard should not be triggered as long as the adviser presents HSA choices as options and provides no financial guidance concerning investment alternatives within a particular HSA option. A broker providing information about fees or reimbursement policies of individual HSA vendors should not be considered to be providing financial guidance or recommendations.

The same standard should apply if an agent or broker is counseling a client on purchasing a high-deductible health plan with both an HRA and HSA. In this case, for the choice of the HSA, the agent or broker would not trigger the fiduciary standard as long as choices are presented to the client as options with no recommendation of one vendor over another, with no associated financial guidance.

NAHU sincerely appreciates the opportunity to provide information about the adverse impact the fiduciary regulation is having on the HSA marketplace and the ability of Americans to gain access to information and financial advice about HSAs. We hope that it will be helpful to you as you work to make improvements to this market for employers, individual consumers and licensed advisors. We look forward to working with you to improve our nation’s healthcare delivery and financing systems in the years ahead, including expanding employer and employee access to consumer-driven account-based plans and the appropriate advice and support to use those plans most effectively.

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