July 21, 2015

Phyllis C. Borzi
Deputy Secretary
Employee Benefit Security Administration
Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

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

Re: Fiduciary Standard Proposed Rule RIN 1210-AB31

Dear Ms. Borzi:

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 pleased to provide comment on the proposed rule concerning revisions to the definition of the term fiduciary and conflict of interest standard concerning retirement investment advice that that was published in Volume 80, number 75 of the *Federal Register* on April 20, 2015.

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 coverage coupled with a Health Savings Account (HSA). We are writing to express our significant concern that this rule, as proposed, will have a chilling impact on employee access to HSAs. By expanding the definition of plan fiduciary to potentially cover not only service providers who assist employers and employees with Individual Retirement Account (IRA) options, but also those who assist with HSAs and Archer Medical Savings Accounts (MSAs), including providing advice on a one-time basis, this proposed rule creates unprecedented new compliance responsibilities and liabilities for employers and licensed health insurance agents and brokers. NAHU is very concerned that 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. Our association believes it is inappropriate to cover and treat HSAs and MSAs under the proposed regulation in a manner similar to IRAs as to both coverage and applicable carve-outs. We urge you to eliminate them from the scope of the final rule.

While health reform has brought employers, employees and even licensed health insurance agents and brokers many new opportunities and protections, it has also made group health plan administration significantly more expensive and complicated for employers and their licensed benefit advisors. Furthermore, health reform has led to revised employer plan designs with an increased emphasis on high-deductible plan choices for people participating in group health benefit arrangements. As employers and their licensed agents prepare for the coming implementation of the Patient Protection and Affordable Care Act's (ACA) health plan excise tax, the inclusion of high-deductible plan offerings in group health plan arrangements is expected to markedly increase. Coupling a qualified high-deductible plan with an HSA is currently a very popular option amongst 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 16 million Americans were enrolled in qualified high-deductible health plans paired with an HSA via an employer group benefit arrangement in 2014. Since the ACA was passed, this market segment has experienced an average growth of 15% per year.[1]

If the Department of Labor expands the fiduciary standard rules to cover service providers who help facilitate group HSA establishment and contributions, NAHU is concerned that employers 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 that will be associated with HSAs. We predict that 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. 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 also fewer general market benefits relative to medical care spending because the employee has little to no incentive to practice responsible consumerism. If the proposed rule stands 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.

For employers, the proposed rule would 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 proposed rule would require employers to determine whether their group health insurance broker met the test and then ensure that the broker met fiduciary liability standards should their service provider qualify. Given all of the other new requirements that employers need to follow in a post-ACA world – including complicated new plan rules, employer shared responsibility requirements, substantial

[1] AHIP Center for Policy and Research, 2005. "2014 HSA/HDHP Census."

employer reporting burdens and the looming excise tax – no group plan sponsor needs to add additional complications to their benefit offerings. The proposed rule would incent employers to drop their HSA-compatible coverage options and group HSA account support as an employee benefit in favor of other options requiring less compliance responsibility and liability, even though those options might be less financially advantageous for employees.

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, the proposed rule would 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 proposed rule could require completely different business standards, interactions, contract structures and payment methodologies with their clients. Based on NAHU's analysis of the proposed rule, 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 five 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 this rule would force agents and brokers to consider other product options for their clients.

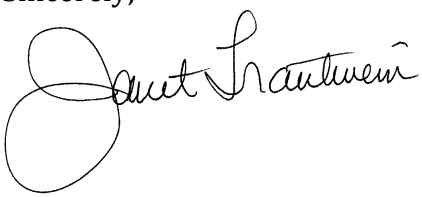
Finally, in addition to our concern about the potentially devastating impact this proposed rule could have on the group HSA marketplace, NAHU does not believe that HSAs and IRAs are similar enough products for the Department of Labor to propose regulating their service providers in the same manner. While 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 $1,766 in 2013, with the average balance ranging from $697 for an account owner under 25 to just $4,460 for individuals at retirement age of 65 and older. Eighty percent of Health Savings Account holders took account distributions in 2013 for medical expenses, with the average amount of the distribution being $1,953.[2] All of this data supports the market observations of our nation's licensed

[2] Employee Benefit Research Institute, June 2014. "HSA Balances, Contributions, Distributions, and Other Vital Statistics—A First Look at Data from the EBRI HSA Database on the 10th Anniversary of the HSA" EBRI Issue Brief #400.

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, NAHU does not believe it is appropriate for the Department of Labor to treat HSAs and MSAs in the same manner as IRAs with regard to conflict of interest and fiduciary standards. 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 final rule.

NAHU sincerely appreciates the opportunity to provide these comments on the proposed rule. 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