AMERICAN BENEFITS COUNCIL

July 10, 2015

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: RIN 1210-AB32 – Conflict of Interest Rule**

Dear Sir or Madam:

On behalf of the American Benefits Council ("the Council"), I am writing to request formal confirmation of several statements of senior U.S. Department of Labor ("DOL") staff made in informal settings, which we greatly appreciate and have been very helpful in understanding the objectives and scope of the proposed new definition of fiduciary and fiduciary advice, that it is not the intention of the DOL for the proposed new rule to apply to health and welfare benefit plans where plan assets are not held in trust.

The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either directly sponsor or provide services to retirement and welfare plans covering over 100 million Americans.

The Council is working closely with its members to consider the impact of the proposed rule redefining the term "fiduciary" on retirement plan sponsors and service providers, and we intend to submit comprehensive comments by the comment period deadline. Our comprehensive comments will focus on plan sponsor issues, as we are considering many retirement and welfare plan issues, including concerns about the appropriateness of applying the new rules to any welfare benefit arrangement. In this letter, however, we wish to highlight several issues that seem to be unintended that we believe warrant clarification from the DOL.

## INSURER PROMOTION OF ITS OWN PRODUCTS

Because selling is generally treated as advice under the new definition, the proposal, as written, would appear to convert the promotion by an insurer (or its agent, a broker or a consultant) of the insurer's own group health,[1] life and disability insurance or similar products to small businesses (or their broker/fiduciary) or employees (of employers of any size) into fiduciary acts even in circumstances where no plan assets are held in trust. It appears that the proposal also would affect companies that promote private exchange services to employers and employees.

Under current law, a seller of these types of products and services does not satisfy the five-part test to become a fiduciary. When a person is acting as a seller, not an advisor, there is not a mutual understanding that the selling activity will serve as a primary basis for decision-making. Buyers do not rely on sellers' advice; on the contrary, buyers evaluate sellers.

The DOL staff has stated informally, in contrast to the interpretation of the Council and many of its members, that turning entities that sell health and welfare insurance policies or private exchange services into fiduciaries was not an intended outcome of the proposed rule, a perspective that is consistent with the preamble to the proposal which focuses almost exclusively on retirement plan issues. A formal and definitive clarification of this important issue would resolve the issue, making the comment period more constructive, a result that would be beneficial to all parties.

This aspect of the proposal, if not clarified, would be very burdensome and disruptive for many welfare benefit plan sponsors, as well as their insurance and other service providers. A more definitive clarification at this juncture that the DOL does not intend for the proposal to turn such promotional activities with respect to health, life or disability insurance into fiduciary acts is important for our members to more fully assess the potential impact of the proposal as we prepare comments for the DOL's consideration.

Furthermore, such clarification is especially critical because, if the promotion of these health and welfare insurance products and private exchange services to small businesses (or their broker/fiduciary) or employees does become a fiduciary act, (1) the insurer or other entity would be vulnerable to a lawsuit simply for selling its own product without sufficiently considering the advantages of competitors' products and

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[1] All references herein to health insurance also include dental, vision and other similar forms of health-related insurance coverage.

(2) as discussed more fully in the Appendix to this letter, it is unclear whether a Prohibited Transaction Exemption ("PTE") would be available to permit the continued sale by an entity of its own insurance or private exchange products to small businesses.

## PLAN SPONSOR EMPLOYEES BECOMING INVESTMENT ADVICE FIDUCIARIES

Plan sponsor personnel may in various ways encourage employees to purchase particular employer-sponsored life, health or disability insurance. This encouragement could, for example, come in the form of discussions with a human resources employee who describes the advantages of certain types of coverage, or through a financial well-being program that is tailored to the circumstances of an individual employee. Such encouragement could result in one or more employees being investment advice fiduciaries. Carried to its logical extension, if a welfare plan participant feels, in retrospect, that she chose the wrong coverage, the participant could have the ability to sue the employee as a fiduciary for providing incomplete or inadequate advice. The burden and costs of this litigation would, in turn, likely fall on the plan sponsor, who will almost certainly need to indemnify employees who provide assistance on group life, health and disability insurance issues. Alternatively, the plan sponsor, who is clearly a fiduciary regarding the plans, could have co-fiduciary liability for well-intentioned actions of employees.

Like the circumstances described above, this outcome of the proposal does not appear to have been intended. We therefore respectfully request some additional clarification that it is not the intention or result of the proposal to have this effect.

Our analysis of why the proposal creates the problems for welfare benefit plans where plan assets are not held in trust is set forth in the Appendix, which is linked here. If you have any questions, please contact the undersigned at 202-289-6700 or at ldudley@abcstaff.org. Thank you for considering these issues.

Sincerely,

Lynn D Dudley

Lynn Dudley
Senior Vice President,
Global Retirement and Compensation Policy