



**BlueCross BlueShield
Association**

An Association of Independent
Blue Cross and Blue Shield Plans

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The Honorable Bradford P. Campbell
Assistant Secretary of Labor
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, N.W.
Room S-2524
Washington, DC 20210

By e-mail

Dear Assistant Secretary Campbell:

Thank you for the opportunity for the Blue Cross and Blue Shield Association ("BCBSA") to submit additional comments for the record on the proposed Section 408(b) (2) regulation ("Proposed Regulation") following the recent hearings held by the Department earlier this month. We appreciate the careful review and thorough process employed by the Department on this important regulation and the opportunity to provide additional comments.

BCBSA would like to reinforce its view that the Proposed Regulation should not apply to health and welfare plans. This position was addressed in our detailed comment letter, submitted to the Department on February 11, 2008. In our view, exempting health and welfare plans is warranted because:

- (1) there are important differences in how fees affect participants of pension plans and health and welfare plans;
- (2) nearly all of the scrutiny of fee arrangements has focused on defined contribution pension plans and the record supporting new regulatory requirements of health and welfare plans is sparse; and
- (3) historically, the Department has been willing to provide greater regulatory relief to health and welfare plans. Our position is discussed in more detail below.

1. The Impact on Participants of Fees Paid by Pension Plans and Health and Welfare Plans Warrants More Favorable Treatment for Health and Welfare Plans

There are significant differences between fee arrangements in defined contribution pension plans and health and welfare plans. We believe that the heightened scrutiny for defined contribution plan fees stems, to a great extent, from the fact that fees are typically charged directly against a participant's individual account, thereby decreasing the account balance immediately and over the participant's long term participation in the plan.

In this regard, the investment management and administrative costs of managing an investment option are nearly always borne directly by the participant's investment in the plan's investment option. There has been concern that certain indirect fees associated with investment options, such as brokerage costs, may not be fully apparent to plan fiduciaries and plan participants. Moreover, hard dollar per participant recordkeeping and administrative fees are commonly charged directly to the participant's individual account. As such, more disclosure and scrutiny may be warranted for pension plans because long term retirement income could be affected if a defined contribution plan overpays for investment or administrative services.

In contrast, the costs of recordkeeping and administration for a health plan are not charged directly to a participant, nor do they reduce the health insurance benefits coverage provided to them. The typical "per member per month" fee paid to a TPA of a self-insured plan is often paid by the plan sponsor out of its general assets. Sometimes the fee is paid from the plan's trust account which holds employer and employee contributions. The cost borne by plan participants is the periodic contribution that is set by the employer in advance of the plan year, and this cost will not vary during the plan year based on either claims experience or other expenses incurred. As such, participants are not bearing recordkeeping fees directly. Moreover, the administrative costs of the plan do not diminish the value of the participant's benefit, as they might for a pension plan. Participants can annually decide whether or not to enroll in the plan based on the plan's contribution requirements and benefit package. If they elect to enroll, participants will get the exact benefit amount that was offered at the time of enrollment for the balance of the plan year. If contributions go up the next year, participants do not have to reenroll.

Because participants do not generally shoulder the cost of health plan recordkeeping directly, and because participant benefits are not generally at risk due to fees paid in connection with health plans, the Proposed Regulation need not apply to welfare benefit plans.

2. Congress is Solely Focusing on 401(k) Plan Fees and Service Providers

Congress clearly shares the Department's concern over service provider fees. However, none of the pending legislation extends to health and welfare plans (or even defined benefit plans). This is because Congress' concern is driven by the fact that the costs of defined contribution plans are ultimately borne by participants and could reduce retirement savings. In this regard, we note that The 401(k) Fair Disclosure for Retirement Security Act of 2007, proposed by Representative Miller (H.R. 3185); The Defined Contribution Plan Fee Transparency Act of 2007, proposed by Representative Neal (H.R. 3765); and The Defined Contribution Fee Disclosure Act of 2007 proposed by Senators Khol and Harkin (S. 2473), all seek to protect defined contribution pension plan participants by expanding disclosure requirements. However, none of the three bills would apply the increased disclosure requirements to health and welfare plans.

The congressional interest in defined contribution fee disclosure follows several reports on pension plan fees published by the U.S. Government Accountability Office. For example, the GAO report *Changes Needed to Provide 401(k) Plan Participants and the Department of Labor Better Information of Fees* (GAO Report to the Ranking Minority Member, Committee on Education and the Workforce, House of Representatives (Nov. 2006)) recommended increased service provider disclosure to plan fiduciaries and increased fee disclosure to plan participants. Again, none of the GAO reports recommend changes in ERISA's disclosure scheme to address deficiencies related to health and welfare plans. This further suggests that the protections of plan sponsors and plan participants embedded in the Proposed Rule are unnecessary with respect to health and welfare plans.

3. The Department Has Issued Numerous Regulations that Provide More Favorable Treatment for Health and Welfare Plans When Compared to Pension Plans

In its own regulations, the Department has routinely and appropriately distinguished between pension plans and health and welfare plans. These distinctions have always accorded more favorable treatment for health and welfare plans. These regulations include the following:

- In 1988, the Department published regulation 29 C.F.R. § 2510.3-102 defining when participant contributions become plan assets subject to the trust, reporting and fiduciary requirements of ERISA. The regulation provides that participant contributions become plan assets "as of the earliest date on which such contributions can reasonably be segregated from the employer's general assets" (29 C.F.R. § 2510.3-102(a)) and clearly allows different maximum time periods for pension plans and welfare plans. Specifically, for pension plans, employers have up to the 15th business day of the month following the month in which participant contributions are received to segregate participant contributions from the employer's general assets. 29 C.F.R. § 2510.3-102(b)(1). In contrast, for welfare plans, the regulation allows employers up to 90 days from the date the employer receives the employee contribution or withholding to segregate participant contributions. 29 C.F.R. § 2510.3-120(c).
- Other regulations have exempted welfare benefit plans from certain reporting and disclosure requirements otherwise applied to pension benefit plans. For example, 29 C.F.R. § 2520.104-20 exempts certain small welfare plans from the requirements to file an annual or terminal report and to furnish copies of the summary annual report, the annual report or the terminal report to plan participants. 29 C.F.R. § 2520.104-20(a)(1)-(3). In addition, the regulation at 29 C.F.R. § 2520.104-44, exempts certain welfare benefit plans from some aspects of the requirement to file the annual Form 5500 Report. Welfare plans that meet the

requirements under the regulation need not complete certain parts of the annual report, engage an independent qualified accountant to conduct a review of the financial statement and schedules of the plan, or attach an independent qualified public accountant's statement to the Form 5500 annual report. 29 C.F.R. § 2520.104-44(c)(1)-(3).

- The Department has also exhibited a willingness to treat welfare benefit plans differently than pension benefit plans with respect to ERISA's trust requirement. In DOL Technical Release No. 88-1 (Aug. 12, 1988), the Department provided that it would not assert a violation in any enforcement proceeding solely because of failure to hold participant contributions to cafeteria plans in trust. In DOL Technical Release No. 92-01 (May 28, 1992), the Department expanded this non-enforcement policy with respect to trust, reporting and disclosure requirements.

The differences in the regulatory treatment of pension benefit plans and welfare benefit plans, especially the willingness of the Department to exempt health and welfare plans from certain reporting and disclosure obligations, indicate that the Department has previously concluded that regulations of the type imposed by the Proposed Regulation are unnecessary with respect to welfare benefit plans.

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In conclusion, as indicated in our initial comment letter, BCBSA believes that the final 408(b)(2) regulation should not apply to health and welfare plans. BCBSA believes special treatment is well justified given the differences between health and welfare plans and pension plans, the lack of a record supporting the application of the broad new rules to health and welfare plans, and the historic willingness of the Department to impose less onerous regulatory burdens on health and welfare plans.

I hope that this letter is helpful in your continuing consideration of the Proposed Regulation. I appreciate your time and attention to this matter. Please do not hesitate to contact me or Jane Galvin with any questions you might have at (202) 626-8651 or by e-mail at Jane.Galvin@bcbsa.com.

Sincerely,

Alissa Fox
Vice President
Legislative and Regulatory Policy