American Bankers Association
HSA Council

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VIA E-MAIL (e-ORI@dol.gov)

Office of Regulations and
Interpretations, Employee Benefits Security Administration
Attn: Conflicts of Interest Rule (RIN 1210-AB32)
Room N–5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: RIN 1210-AB32: Comments Regarding Application of Proposed Fiduciary and Conflict of Interest Rules to Health Savings Accounts (HSAs)

Dear Sir or Madam:

Thank you for the opportunity to comment on the Department of Labor's proposed regulation (the "Proposed Rule") pertaining to the definition of fiduciary and conflict of interest rules under the Internal Revenue Code ("Code") and the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). Specifically, we are writing to you on behalf of the American Bankers Association's HSA Council (the "Council"), (i) to request that the Department exclude personal health savings accounts ("HSAs") under the Proposed Rule because of the significant differences between IRAs and HSAs, and (ii) to set forth the Council's position as to why it believes that HSAs should not be subject to the Proposed Rule.

Currently, nearly 20 million Americans are covered by an HSA-qualified health plan that enables them to fund their healthcare expenses with an HSA. Under Section 223(d) of the Code, HSAs are by definition personal accounts established exclusively to fund health care expenses. Unlike IRAs, HSAs are not established as retirement accounts with a primary purpose to fund retirement income needs. As we discuss below, investments are just an optional feature of HSA arrangements with fewer than 2-3% of accountholders taking advantage of it. Indeed many bank custodians do not even offer an investment feature. Rather, HSAs allow ready access to consumer funds in deposit-type accounts through the use of debit cards or consumer checks. Perhaps more importantly, unlike IRAs, HSAs are precluded from accepting significant rollovers from ERISA-covered retirement plans.

The members of the ABA's HSA Council,[1] as well as the employers they serve, are concerned that application of the Proposed Rule to HSAs will unnecessarily increase the cost of offering

[1] The ABA HSA Council is made up of financial institutions, health insurers, third party administrators and technology companies working to represent consumers insured with Health Savings Account qualified health plans. The Council is part of the American Bankers Association in Washington D.C.

HSAs and will preclude HSAs from achieving their Congressionally mandated purpose – i.e., to provide a source of funds for health care expenses. For the reasons set forth below, we believe that HSAs should be excluded from the Proposed Rule.

HSAs are Distinguishable From IRAs and Other Retirement Investment Arrangements and Should Be Exempt from the Proposed Rule. After justifying the need to regulate IRAs under the proposed Rule due to their role as a pass through of ERISA-covered retirement funds, the Department swept in other tax favored accounts (including HSAs). The Department has relegated to a mere footnote its solicitation of comments on whether it is appropriate to regulate HSAs as if they were IRAs.[2] The Council believes that the answer to this question is a resounding "No. HSAs should not be treated like IRAs under the Proposed Rule."

Under Section 223 of the Code, HSAs are individually owned trust or custodial arrangements established "exclusively for the purpose of paying qualified medical expenses." Thus, unlike IRAs, which serve solely as investment oriented retirement arrangements, HSAs serve as deposit-type arrangements maintained by accountholders for current health care expenses with funds that are readily accessible by check or debit card access for current medical needs. Congress, while incorporating some of the rules applicable to IRAs, recognized that HSAs were different than IRAs, and thus subject to different rules. By way of example, while Congress incorporated certain prohibited transaction rules applicable to IRAs in Section 408(e)(2) and (e)(4), HSAs are not permitted to be commingled with retirement assets as is allowed for IRAs under Section 408(e)(6). Likewise, in DOL FAB 2006-2, the DOL acknowledged that even though HSAs were subject to the tax prohibited transaction rules, HSAs were significantly different from IRAs so as not to allow wholesale adoption of the IRA prohibited transaction exemptions (PTEs). Courts have likewise differentiated HSAs from retirement investment accounts due to the ability to access funds freely and without penalty for current medical expenses.[3]

The Department notes that the primary justification for extending the reach of the statutory conflict of interest provisions beyond their reach is its concern that "as baby boomers retire, they are increasingly moving money from ERISA-covered plans, where their employer has both the incentive and fiduciary duty to facilitate sound investment choices to IRAs."[4] This risk simply does not exist with respect to HSAs. HSAs are statutorily prohibited from accepting significant funds from IRAs or other ERISA-

[2] See 80 Fed Reg. 21947

[3] For example, courts have found that the ability to instantly access HSA funds without penalty distinguishes them from IRAs and other retirement plans for state bankruptcy law purposes. See *Roup v. Commercial Research, LLC, 2015 WL 3452615 (Colo. 2015). Available at* ***https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Opinions/2014/14SC50.pdf***

[4] See 80 Fed Reg. 21932

covered plans.[5] As a result, blanket application of the investment rules applicable to deferred compensation plans (and for that matter even IRAs) is inappropriate. The Proposed Rule should specifically exclude HSAs since HSAs do not include ERISA-covered funds and HSAs operate more like retail bank and savings accounts than depositories of retirement plan funds.

Application of ERISA-Type Investment Rules is Inappropriate for HSA Deposit-Type Arrangements. The Department implicitly acknowledged that ERISA is ill-suited for application to HSAs when it adopted specific rules carving the vast majority of HSAs out of ERISA coverage in DOL FAB 2004-1 and DOL FAB 2006-2. Indeed, we are unaware of any HSA arrangements that are currently subject to ERISA regulation. This broad exception is fitting as the vast majority of HSA assets (86%) are held in deposit-type arrangements.[6] While HSA accountholders may be allowed an investment option if/when HSA assets exceed a certain threshold level, only a minority of accountholders (less than 4%) utilize such options and any investment activity is ancillary to providing a ready source of funds for current medical expenses. Indeed, the average HSA balance is less than $1760 with approximately 56% of accounts having less than $500. [7] These amounts are far less than the amount necessary to cover a single year's deductible since the average HSA-qualified HDHP is $2205 for single coverage and 4391 for family coverage.[8] These numbers underscore the true function of these accounts as deposit-type accounts for current health expenses -- far from suggesting that HSAs are savings accounts or investment vehicles warranting protection from loss of assets set aside solely for retirement. As deposit-type accounts, HSAs are already subject to numerous federal and state banking requirements and regulatory agencies. The imposition of an additional layer of regulation as set forth in the Proposed Rule will unnecessarily increase costs and reduce effective rate of return.

Congress already concluded that the imposition of investment requirements is unnecessary for deposit-type arrangements (See Code Section 4975(d)(4)). Consequently, the option to deposit HSA funds in two or more interest bearing accounts shouldn't be considered "investments" or "investment advice" for purposes of these rules. Choosing such an account is no different than choosing which checking account to establish—an activity in which most if not all HSA accountholders have sufficient experience. Therefore, the purported investment protections of the Proposed Rule need not be extended to such actions and language should be added to clarify that the Proposed Rule does not apply to funds held in an HSA since any investment activity is ancillary.

[5] While Section 408(d)(9) of the Code allows for a limited once in a lifetime time opportunity to rollover IRA funds , the maximum rollover amount is reduced by any contribution made that year and is capped at that year's contribution limitation (currently $3350 for an individual and $6650 for a family). Council members report that this provision is seldom (if ever) utilized.

[6] http://www.devenir.com/research/2014-year-end-devenir-hsa-market-research-report/

[7] http://www.devenir.com/research/2014-year-end-devenir-hsa-market-research-report/

[8] The Kaiser Family Foundation and HRET Employer Health Benefits 2014 Annual Survey.

At a minimum, the Department should exclude funds held in a deposit type arrangement with an HSA custodian or trustee. [9]

- **If HSAs Are Not Excluded From the Proposed Rule, Clarify That The Platform Provider Exception Applies.** As noted above, the Department acknowledged that it was blazing new ground when it included HSAs within the definition of IRA and solicited comments on application of the Proposed Rule through such incorporation. As outlined above, we believe such an approach is overly broad given the nature of HSAs and the ancillary nature of any investment activity. However, if the Proposed Rule is ultimately made applicable to HSAs, the Council believes that the Department carried this bootstrapping too far by excluding HSAs from the platform provider exception due to their purported similarity to IRAs. For the reasons discussed below, we believe that HSAs should be eligible for the platform provider exception. In most cases the HSA trustee or custodian is selected by an employer or exchange provider.

  As noted above, the transactional nature of HSAs makes them distinguishable from IRAs. Moreover, unlike IRAs, HSAs do not receive funds from arrangements previously subject to ERISA's conflict of interest requirements. In contrast to IRAs, the vast majority of HSAs (and HSA contributions) are made available to employees through employer-sponsored and/or employer funded arrangements.[10] More recently, exchanges (both private and public) have selected HSA custodians and trustees as business partners. As a result, HSA accountholders are not without a third party looking out for their interests. DOL carefully considered and recognized the scope of employer involvement in HSA arrangements in FAB 2004-1 and FAB 2006-2 and, while it concluded that ERISA was not applicable, DOL acknowledged the important role employers play in selecting HSA service providers.

  Based on this carefully considered DOL guidance it is common for employers to take an active role in selecting n HSA custodian and to facilitate the establishment of employee owned HSAs. Consistent with the DOL FAB guidance employers routinely engage in one or more of the following on behalf of their HSA account holders:

  - Select an HSA custodian or trustee for employer sponsored arrangements;
  - Open an HSA account on behalf of consenting employees to receive employer contributions;
  - Fund the HSA with employer contributions;
  - Limit payroll deductions and employer contributions to a selected HSA custodian/trustee;
  - Pay a portion of the HSA administration fees assessed by the custodian or trustee;

[9] We note that even though structured as deposit type accounts, HSAs qualify as a bona fide trust/custodial account for purposes of certain bank regulatory requirements.
[10] A recent AHIP study reflects that 89% of HSAs are offered in conjunction with employer sponsored coverage.

- o Decide whether to offer their own 401(k) menu of investment options or select an HSA custodian or trustee that offers its own "menu" of self-directed HSA investment options.

Notwithstanding this significant employer involvement, which might be considered "endorsement" (e.g., for purposes of determining whether ERISA applied under the voluntary safe harbor provisions of 29 C.F.R. § 2510.3-1(j)), the Department concluded that ERISA did not apply. In this unique role, employers (and organizers of public and private exchanges) wield sophisticated bargaining power in selecting an HSA service provider more analogous to a commercial transaction between two informed companies. This is in stark contrast to the atypical IRA arrangement where the employer has no involvement at all (indeed employer contributions to IRAs are generally prohibited).

It is also important to note that HSA custodian/trustees must make available a slate of investment options that is acceptable to all of their employer sponsored HSA arrangements. This single slate approach is required because employers are prohibited from making or selecting the investment options included in the menu. This same menu of investment options is generally made available "enterprise-wide" to individuals who set up an HSA outside of the employer context as well as those who establish an HSA through an employer. Thus, the exception for HSAs from the Proposed Rule should apply across the board. Same rule can apply to HSAs generally.

Most significantly, in the FAB guidance, the Department concluded that the interests of HSA account holders were adequately protected in part because HSA assets could be readily withdrawn or transferred to another HSA. This continues to be the case for all HSAs regardless of their origin as HSA account funds can be withdrawn at any time and used for medical expenses (or any other purpose) or rolled over to another HSA arrangement.

In light of the foregoing, we believe that the platform provider exception should be modified to specifically apply to HSAs. At a minimum, this carve-out should be amended to exclude HSAs from the new investment rules when the same broad menu of investment options is made available to all HSAs (including both employer and retail marketed HSAs).

- **The Proposed Rule Should Clarify That HSA Trustees/Custodians Do Not Provide Individualized Investment Advice by Merely Providing a Menu of Pre-selected HSA Investment Options.** As noted above, the vast majority of HSA assets are kept in deposit-type accounts and should not be subject to the investment related requirements of the Proposed Rule. Nonetheless, even if the Proposed Rules is ultimately considered to be applicable to HSAs, HSA trustees/custodians that provide a menu of investment options for employer groups are not providing individualized investment advice.

The preamble to the Proposed Rule makes it clear that the Department intentionally intended to move away from assigning fiduciary status with respect to investment decisions based on nominal fiduciary status (as was the case under the 2010 proposed rule) and move toward a more functional definition.[11] The key elements under this new functional definition are: i) the provision of investment advice; that ii) is individualized or directed to a specific individual. In stark contrast to providing individualized advice, HSA custodians and trustees generally make available a reasonable menu of investment options (typically mutual funds regulated under the Investment Company Act). In some cases the "menu" may be open-ended (i.e., a so-called brokerage account) or may be pre-selected (e.g., by an RIA selected by the HSA custodian or trustee).

Employers are then free to evaluate the HSA custodian or trustee (including the suitability of investment options) and choose to select or not select the services of that custodian or trustee. Given the intervening role of the employer (or exchange), no individualized advice is provided when an HSA trustee or custodian makes a menu of investment options available through an employer group. Indeed HSA custodians take significant steps to make it clear to the employer and HSA accountholders that individualized advice is not provided. The role of an HSA custodian/trustee as a nominal fiduciary does not change this result.

Instructive in this regard is DOL's prior guidance under FAB 2006-2. In that guidance DOL carefully considered the role of selecting a "menu" of HSA investment options and determined that an employer would not be "influencing or making an investment decision" when it selected an HSA trustee or custodian that offered the trustee/custodian's own proprietary menu of investment options. This FAQ is reproduced below:

> **Would an employer be viewed as "making or influencing" the HSA investment decisions of employees, within the meaning of the FAB, merely because the employer selects an HSA provider that offers some or all of the investment options made available to the employees in their 401(k) plan?**
> No. The mere fact that an employer selects an HSA provider to which it will forward contributions that offers a limited selection of investment options or investment options that replicate the investment options available to employees under their 401(k) plan ***would not, in the view of the Department, constitute the making or influencing of an employee's investment decisions*** giving rise to an ERISA-covered plan, so long as employees are afforded a reasonable choice of investment options and employees are not limited in moving their funds to another HSA. The selection of a single HSA provider that offers a single investment option would not, in the view the Department, afford employees a reasonable choice of investment options.

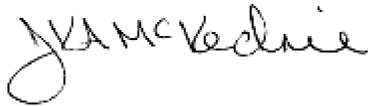
[11] 80 Fed reg. 21935

As noted above, providing a menu of HSA investment options does not rise to "making or influencing an [individual] investment decision" as long as employees are afforded a reasonable choice of investment options and can move HSA funds to another HSA (which is always the case).

In conclusion, the Council believes that the current disclosure rules applicable under existing law adequately protects the interests of HSA owners and that the extensive requirements outlined in the Proposed Rule and the consequences for failing to meet such requirements should not apply to HSAs.

Thank you for the opportunity to express the Council's views with respect to the Regulations and we would be happy to answer any questions the Department may have.

Sincerely,



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