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EMAIL AND ELECTRONC FILING

Office of Exemption Determinations
EBSA, (Attention: D-11933)
U.S. Department of Labor
200 Constitution Avenue NW, Suite 400
Washington, DC 20210

Re: RIN 1210-AB82, Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions

Dear Sir or Madam:

We appreciate the opportunity under the Department's "Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions", RIN 1210-AB82 ("RFI") to submit comments regarding the final conflict of interest fiduciary rule ("Fiduciary Rule") and the unique issues that may arise when the Fiduciary Rule is applied with respect to health savings accounts ("HSAs"). The RFI notes that some individuals "have said that health savings accounts (HSAs) merit a special exclusion or streamlined exemption because they tend to be invested in shorter-term deposit products to pay qualifying health expenses." Alston & Bird, LLP, a national law firm, represents various entities that provide HSA related custodial and banking services to consumers. We submit this letter on behalf of a client who is an IRS approved non-bank custodian for HSAs.

HSAs are rapidly becoming a primary source of funding for current medical expenses due to the proliferation of high deductible health plans. In fact, HSAs play a critical role in the Administration's health care proposal to reduce current health care costs. To ensure that HSA owners have immediate and easy access to HSA funds when medical expenses arise, HSA funds are often held in certain transaction accounts described below that are similar to checking accounts.

These transaction accounts serve as a temporary holding account for funds and are intended to facilitate prompt disbursement of funds for qualifying medical expenses or other purposes as they are incurred. These transaction accounts are not intended to facilitate long term savings for future medical expenses and as such do not warrant the protections afforded by the Fiduciary Rule. Consequently, we seek clarification that such accounts are not considered investment property for purposes of the Fiduciary Rule. If transaction accounts associated with HSAs are considered investment property for purposes of the fiduciary rule, the costs to maintain transaction accounts will rise as a result of the increased administrative costs prompted by the Fiduciary Rule. Perhaps more importantly, application of "investment" rules to what are basically "checking accounts" will create consumer confusion and make it more difficult for employers to facilitate establishment of HSAs for their employees. Increased costs and confusion will make HSAs less viable, which will ultimately upend the health care reform proposals advanced by the Administration. Thus, to the extent HSA demand accounts are not already outside the Fiduciary Rule's definition of investment property, as discussed below, we believe HSA demand accounts "merit a special exclusion" from the definition of investment property.

Overview of HSAs

HSAs are trust or custodial accounts established by eligible individuals in accordance with Internal Revenue Code Section 223. The primary purpose of an HSA is to facilitate the tax free payment or reimbursement of qualified medical expenses incurred by the HSA owner and the owner's qualifying family members.[1] HSAs are governed by tax rules similar to Individual Retirement Accounts ("IRAs"). However, HSAs are very different from IRAs because account owners may use HSA funds to pay for qualified medical expenses immediately, without leaving funds for long periods of time (e.g., typically until retirement) without penalty as those expenses are incurred.

In order to facilitate the payment of medical expenses as they are incurred, many HSA custodians offer HSA owners the opportunity to hold HSA funds in certain types of transactional accounts that operate the same as interest bearing checking accounts. The transactional account may be held by the HSA owner in a regulated bank, in which case the account qualifies as a "demand deposit", or "NOW" account.[2] Alternatively, if the HSA is maintained by an IRS approved non-bank custodian or insurance company, the custodian may hold the funds in a similar type of account on behalf of the HSA owner. Regardless, these accounts (collectively referred to as "Demand Accounts") share a common element—they permit unlimited withdrawals without restriction. Since there are no restrictions on withdrawals, they are designed - not for long term savings - but for immediate use as the need arises. In fact, for regulated banks, the Federal Reserve considers them to be transaction accounts for Regulation D purposes.[3] The fact that they earn interest is ancillary to their primary purpose.

Contrast Demand Accounts with other bank products that are "timed products", such as certificates of deposit ("CDs"), that penalize account holders for withdrawing funds prior to the specified maturity date and savings and money market accounts, each of which limit the number

[1] 26 U.S.C. Section § 223(d)(1).

[2] *See* 12 U.S.C. § 204.2(b)(1) and (2) for a definition of "demand deposit" account; *see* 12 U.S.C. § 1832 for a definition of NOW account. Until 2011, demand deposit accounts could not impose interest and NOW accounts could. That distinction was eliminated in 2011 by the Dodd-Frank Act. Currently, Regulation D requires banks to reserve the right to require at least seven days' notice of withdrawal for a NOW account but banks almost never actually require seven days' notice. The reservation of right is the only distinction between the two accounts. Both accounts allow unlimited transactions without penalty.

[3] See Federal Reserve's Consumer Compliance Handbook.

of withdrawals the account owner may make during a specified period.[4] The Federal Reserve considers these to be non-transaction accounts due to the restrictions on withdrawals.[5] Unlike the Demand Accounts described above, these accounts are not intended to facilitate current use, like a checking account, but are instead intended to generate long term savings for future use.

HSAs may consist only of Demand Accounts or a custodian may separately make available a separate component consisting of mutual funds and other investment property permitted for IRAs (e.g. CDs) that are designed to facilitate long term savings for future use.

Application of ERISA-like Investment Rules is Inappropriate for Demand Accounts

The Department implicitly acknowledged that HSAs are ill-suited for regulation under ERISA when it adopted safe harbors that carve out the vast majority of HSAs from ERISA in Field Assistance Bulletins 2004-01 and 2006-02. As a result, we are not aware of *any* HSAs that are currently subject to ERISA regulation. The Department's broad exception is fitting because the vast majority of HSA assets (85%) are held in Demand Accounts.[6] Although HSA accountholders may be allowed to invest their accounts if/when HSA assets exceed a minimum threshold, only a small minority of accountholders (about 4%) utilize such options and the investment activity is ancillary to providing a ready source of funds for current medical expenses. Indeed, the average HSA balance at year end is $2,536.[7] This is only slightly more than the amount needed to cover a single year's deductible under a HSA qualified high deductible health plan ("HDHP") that provides single coverage and significantly less than the amount required to cover the deductible for family coverage. The average deductible under a HSA qualified HDHP is $2,199 for single coverage and $4,343 for family coverage.[8] These numbers highlight how the true function of most HSAs is as a Demand Account for current health expenses rather than savings accounts or investment vehicles. HSA Demand Accounts are already subject to numerous federal and state requirements and regulatory agencies. Additional regulations and contractual representations will only increase costs and reduce the effective rate of return.

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[4] See 12 U.S.C. § 204.2(d)(1) for a definition of savings deposits, which includes money market accounts. See 12 U.S.C. § 204.2(c)(1) for a definition of certificates of deposits and other "time" deposit accounts.

[5] See Federal Reserve's Consumer Compliance Handbook

[6] Devenir Research, *2016 Year-End HSA Market Statistics & Trends Executive Summary*, Feb. 22, 2017, available at http://www.devenir.com/wp-content/uploads/2016-Year-End-Devenir-HSA-Market-Research-Report-Executive-Summary-1.pdf (last visited July 21, 2017).

[7] P. Fronstin, *Trends in Health Savings Account Balances, Contributions, Distributions, and Investments, 2011-2016: Statistics from the EBRI HSA Database*, Employee Benefit Research Institute, July 11, 2017, available at https://www.ebri.org/pdf/briefspdf/EBRI_IB_434_HSAs.11July17.pdf (as visited July 19, 2017).

[8] The Kaiser Family Foundation and Health Research & Educational Trust, *Employer Health Benefits 2016 Annual Survey*, Exhibits 7.5 and 7.19, available at http://files.kff.org/attachment/Report-Employer-Health-Benefits-2016-Annual-Survey (last visited July 21, 2017).

Demand Accounts are Not Investment Property

The Fiduciary Rule imposes obligations on individuals and entities who make certain recommendations, as defined by the Fiduciary Rule, with respect to "securities or other investment property". If a particular product is not a security or "other investment property", the specific requirements of the Fiduciary Rule do not apply with respect to actions taken by an HSA service provider regarding that product. The preamble to the Fiduciary Rule states:

> "As a result, and to expressly make this point, the Department has modified the final rule to make it clear that, in order to render investment advice with respect to moneys or other property of a plan or IRA, the adviser must make a recommendation with respect to the advisability of acquiring, holding, disposing or exchanging *securities or other 'investment' property*."

Unfortunately, the Fiduciary Rule does not provide a clear and concise definition of "other investment property".

Webster's defines "investment" as a "possession acquired for future income or benefit" and this definition is consistent with the theme throughout the Fiduciary Rule. Thus, investment property seemingly includes only that property or those products that are designed to facilitate long term savings for future use. Although the Fiduciary Rule does not address bank products generally, the Secretary notes in the preamble that CDs and "similar investment products" qualify as investment property:

> "In the Department's view, the definition of investment property in paragraph (g)(4) should include bank CDs and similar investment products. The Department does not see any basis for differentiating advice regarding investments in CDs, including investment strategies involving CDs (e.g., laddered CD portfolios), from other investment products. To the extent an adviser will receive a fee or other compensation as a result of a recommended investment in a CD, that communication presents the type of conflict of interest that is the focus of the rule."

We agree that CDs and related time deposit products similar to CDs that impose restrictions on withdrawals, such as savings and money market accounts, are investment property under the Fiduciary Rule because they are specifically designed—through the withdrawal restrictions- to generate long term savings for future use. Demand Accounts, on the other hand, differ greatly from CDs and other similar bank products because Demand Accounts do not impose any limitations on withdrawals. Their primary purpose is to facilitate use of funds as the need arises--similar to a checking account. The fact that the Demand Accounts earn interest is ancillary to the primary purpose. Only about 4% of HSAs hold contributions in investments.[9] Also, some banks, insurers, and non-bank trustees and custodians do not offer an investment feature.

[9] P. Fronstin, *Trends in Health Savings Account Balances, Contributions, Distributions, and Investments, 2011-2016: Statistics from the EBRI HSA Database*.

Consequently, Demand Accounts should not be considered investment property for purposes of the Fiduciary Rule.

We also note that the SEC does not consider Demand Accounts to be "investment property." On SEC's "investor.gov" website, the SEC lists a variety of bank products in their list of investment types, including CDs, savings accounts and money market accounts. Demand Accounts (and similar arrangements) are not listed on the site as investment types.[10]

Last, the nature of the Demand Accounts prevents communications about them from being "recommendations" as contemplated by the Fiduciary Rule. The Fiduciary Rule defines a recommendation as a "communication that based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action." Since the Fiduciary Rule only applies to certain recommendations made with respect to securities and "other investment property", and investment property is property intended to generate long terms savings for future use, no reasonable person could view a communication regarding a Demand Account, which is tantamount to a checking account, to be a suggestion to engage in or refrain from taking action *with respect to investment property*. Treating such communications as recommendations subject to the requirements of the Fiduciary Rule will only lead to confusion about the nature and purpose of the Demand Accounts, which will cause HSAs to be less effective.

Bank Deposit Exemption

The Department's RFI asks:

> "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?"

If the Department believes that Demand Accounts may become "investment property", or that communications about them may become "recommendations", then we propose that the Department use a streamlined exemption for Demand Accounts offered by insurers and non-bank custodians that follows the Code § 4975(d)(4)(B) bank deposit exemption rather than the BIC Exemption.

Code § 223 specifically contemplates that banks, insurers, and IRS approved non-bank custodians can serve as HSA custodians and trustees. However, Demand Accounts provided by banks will not be subject to the Fiduciary Rule even if Demand Accounts are "investment property" or banks' communications about them are "recommendations" because the bank deposit exemption prescribed by Code Section 4975(d)(4)(B) applies. The Code § 4975(d)(4)(B) bank deposit exemption allows "financial institutions" to accept HSA contributions and place them in Demand Accounts without triggering a potential prohibited transaction as long as the conditions in the statutory exemption are satisfied. For example, the exemption is satisfied if a plan provision expressly permits funds to be deposited into accounts with the bank or trustee that earn interest. Although the Department treats insurance carriers and IRS non-bank custodians as financial

[10] https://investor.gov/introduction-investing

institutions for many purposes, including the Fiduciary Rule, it does not appear the bank deposit exemption treats insurers or IRS approved non-bank custodians as financial institutions. This puts non-bank custodians at a significant disadvantage because the non-bank custodian would, without justification, be subject to a much more stringent rule for the exact same type of account.

Thus, if the Department concludes that Demand Accounts are "investment property" under the Fiduciary Rule, or that communications about Demand Accounts are "recommendations", then we request that the Department extend the bank deposit exemption to insurers and IRS approved non-bank custodians. Like banks, insurers and non-bank custodians are typically subject to strict state regulatory oversight, as well as many of the federal laws applicable to banks (for example, the Patriot Act). An exemption for insurers and IRS approved non-bank custodians that follows the bank deposit exemption under Code § 4975(d)(4)(B) would put all of the entities that can serve as HSA custodians and trustees on equal footing under the Fiduciary Rule without jeopardizing the interests of the accountholder.

CONCLUSION

As further discussed above, we believe that the Department should provide clarification establishing a clear exception for Demand Accounts from the Fiduciary Rule. We would be pleased to meet with the Department and further discuss the issues outlined herein.

Sincerely,

John R. Hickman