

July 27, 2017

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

*Submitted via Federal eRulemaking Portal at <http://www.regulations.gov>*

Re: RIN 1210-AB82: Comments Regarding Application of Proposed Fiduciary and Conflict of Interest Rules to Health Savings Accounts

Dear Sir or Madam:

On July 6, 2017, The Department of Labor published a request for information in connection with its examination of the final rule defining who is a “fiduciary” of an employee benefit plan for the purposes of the Employee Retirement Income Security Act of 1974 (“ERISA”) and the Internal Revenue Code (the “Code”), as a result of giving investment advice for a fee or other compensation with respect to assets of a plan or IRA (the “Fiduciary Rule”). The Employers Council on Flexible Compensation (“ECFC”) appreciates the opportunity to submit comments to the Labor Department in furtherance of its review of the Fiduciary Rule and the new or revised administrative class exemptions from the prohibited transaction provisions of ERISA and the Code (the “Prohibited Transaction Exemptions”). ECFC will provide comments in this letter on the application of the Fiduciary Rule and the Prohibited Transaction Exemption to Health Savings Accounts (“HSAs”)

ECFC is a membership association dedicated to preserving and expanding employer-provided tax-advantaged benefit choices for working Americans, including account-based benefit plans which provide benefits in areas such as health care, child care, and commuting. These benefits provide families with the support they need to meet their everyday living expenses and remain productive members of the workforce. ECFC’s members include employers who sponsor employee benefit plans, including health reimbursement arrangements, flexible spending arrangements, and health savings accounts, commuter and parking benefits as well as insurance, accounting, consulting, and actuarial companies that design or administer employee benefit plans. ECFC member companies assist in the administration of cafeteria plan and health benefits for over 33 million employees.

HSAs Are Primarily Used to Fund Health Care Expenses and Should Not Be Subject to the Fiduciary Rule like IRAs.

ECFC members believe that to impose the same fiduciary requirements for HSAs as are imposed on Individual Retirement Accounts (“IRAs”) is administrative overreach by the Department. The Department can justify its need to regulate IRAs under the Fiduciary Rule since IRAs frequently are a conduit for ERISA-covered retirement plans. The same cannot be said of HSAs. HSAs are personal accounts which are established to fund health care expenses. While an HSA owner can make a one-time transfer from an IRA to an HSA, the amount of that transfer is limited to maximum annual contribution limit for the HSA in that year.<sup>i</sup> This indicates that the transfer is allowed for the HSA owner to provide initial funding for an HSA and not as a means of transferring retirement assets from an IRA to an HSA.

In operation, HSAs are seldom used as a retirement savings vehicle. There are over 20 million HSA accounts according to the 2016 Year End HSA Market Research Report prepared by Devenir Research.<sup>ii</sup> These HSA accounts hold approximately \$37 billion in assets with \$31.5 billion held in deposit -type arrangements and \$6.9 billion in other investment assets.<sup>iii</sup> While HSA accountholders may be allowed an investment option if/when HSA assets exceed a certain threshold level, only a minority of accountholder (less than 4 %) utilize such options and any investment activity is ancillary to providing a ready source of funds for current medical expenses.<sup>iv</sup> According to the Employee Benefit Research Institute, as of the end of 2015, the average HSA balance was \$1,844, up from \$1,332 at the beginning of the year. Average account balances increased with the age of the owner of the account. Account balances averaged \$759 for owners under age 25 and \$3,623 for owners ages 65 and older.<sup>v</sup> Of the HSA accounts included in the EBRI HSA Database, 83% of the HSAs that received a contribution in 2015 also had a distribution in 2015. This underscores 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 Fiduciary Rule will unnecessarily increase costs and reduce effective rate of return. Consequently, ECFC requests that the Department amend the Fiduciary Rule to exclude HSAs.

#### Platform Provider Exception Should Apply to HSAs

If the Department does not agree with ECFC’s recommendation that HSAs should not be subject to the Fiduciary Rule, the Department should permit HSAs to be eligible for the platform provider exception in the Prohibited Transaction Exceptions.

Under the platform provider exception, service providers, such as record-keepers and third party administrators, that offer a "platform" or selection of investment vehicles to participant-directed individual account ERISA plans would not be providing investment advice by marketing or making available to a plan specific investment alternatives to be made available to participants, without regard to the individualized needs of the plan or its participants and beneficiaries, as long as they disclose in writing that they are not undertaking to provide impartial investment advice or to give advice in a fiduciary capacity. Under this exception, a service provider would not be considered a fiduciary due to selecting and monitoring investment alternatives that they offer to participants, as well as identifying

investment alternatives meeting objective criteria specified by the plan fiduciary (e.g., expense ratios, fund size, or asset type specified by the plan fiduciary) or providing objective financial data regarding available alternatives to the plan fiduciary. Under the current Prohibited Transaction Exemptions, this exception would not extend to IRAs and other non-ERISA plans, such as HSAs.

ECFC believes that the interests of HSA account holders are adequately protected because HSA assets can be readily withdrawn or transferred to another HSA. The fact of easy liquidity of HSA assets had previously been the foundation of the Department's earlier rule outlining when ERISA applied in employer involvement in establishing HSA arrangements for their employees. FAB 2004-1 and FAB 2006-2. Consequently, ECFC requests that the platform provider exception contained in the Prohibited Transaction Exemptions be modified to include HSAs.

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We hope that the Department will consider our recommendations as to modifications to the Fiduciary Rule and the Prohibited Transaction Exemptions as they relate to HSAs. If you have any questions regarding our recommendations or would like further information regarding HSAs, please contact ECFC's Legislative and Technical Director, Bill Sweetnam, at 202.465.6397 or at [wsweetnam@ecfc.org](mailto:wsweetnam@ecfc.org).

Sincerely,



William F. Sweetnam, Jr.  
Legislative and Technical Director



Advancing  
Healthcare  
Consumerism

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<sup>i</sup> Code Section 408(d)(9)

<sup>ii</sup> 2016 Year-End Devenir HSA Market Research Report <http://www.devenir.com/wp-content/uploads/2016-Year-End-Devenir-HSA-Market-Research-Report-Executive-Summary-1.pdf>

<sup>iii</sup> 2016 Year-End Devenir HSA Market Research Report

<sup>iv</sup> Trends in Health Savings Account Balances, Contributions, Distributions, and Investments, 2011–2016: Statistics from the EBRI HSA Database by Paul Fronstin, Ph.D., Employee Benefit Research Institute

<sup>v</sup> Health Savings Account Balances, Contributions, Distributions, and Other Vital Statistics, 2015: Estimates from the EBRI HSA Database by Paul Fronstin, Ph.D., Employee Benefit Research Institute