ConnectYourCare
the future of health savings

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Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Fiduciary Rule
Room N-5655
United States Department of Labor
200 Constitution Avenue
Washington, D.C. 20210

April 17, 2017

Re: Proposed Rule on the Impact of the Fiduciary Rule and Prohibited Transaction Exemptions
RIN 1210-AB79

Submitted Electronically: www.regulations.gov

Dear Sir or Madam:

Thank you for the opportunity to provide comments to assist the Department of Labor's (the "Department") update to its legal and economic analysis concerning the likely impact of the *Definition of the Term "Fiduciary;" Conflict of Interest Rule—Retirement Investment Advice* ("the Rule"), which was published in the Federal Register on April 8, 2016. As adopted the Rule broadly expands the scope of who is considered a "fiduciary" under the Employee Retirement Income Security Act ("ERISA") and the Internal Revenue Code of 1986 ("Code") as a result of providing "investment advice." On February 3, 2017, the President issued a Memorandum directing the Department to review the Rule to ensure that it is consistent with the Administration's intent:

> to empower Americans to make their own financial decisions, to facilitate their ability to save for retirement and build the individual wealth necessary to afford typical lifetime expenses, such as buying a home and paying for college, and to withstand unexpected financial emergencies.[1]

Specifically, the Department was instructed to evaluate:

1) Whether the anticipated applicability of the final rule has harmed or is likely to harm investors due to a reduction of American's access to certain retirement savings offerings, retirement product structures, retirement savings information, or related financial advice;

[1] Fiduciary Rule: Memorandum for the Secretary of Labor, 82 Fed. Reg. 9675, 9675 (Feb. 7, 2017) (hereinafter Memorandum).

2) Whether the anticipated applicability of the final rule has resulted in dislocations or disruptions within the retirement services industry that may adversely affect investors or retirees; and

3) Whether the final rule is likely to cause an increase in litigation, and an increase in the prices that investors and retirees must pay to gain access to retirement services.[2]

The Department has an important responsibility to ensure adequate consumer protection for retirement investors. ConnectYourCare appreciates the Department's efforts to protect retirement investors from obtaining financial advice without being subject to abusive or deceptive practices. While we support the goal of the Rule, ConnectYourCare believes that certain aspects of the Rule as they relate to the administration and management of health savings accounts ("HSAs") are fundamentally flawed and inconsistent with the priorities articulated by the Administration. As detailed below, we believe the Rule should be revised to avoid the unintended consequences of reducing access to HSAs and raising the cost of services utilized by HSAs consumers.

I. ConnectYourCare/HSA Overview

ConnectYourCare is a leading consumer-directed health care company providing services to employers and employees in the areas of tax-advantaged account reimbursement administration, including Health Savings Accounts ("HSAs"), Health Reimbursement Arrangements ("HRAs"), health Flexible Spending Accounts ("FSAs"), and Dependent Care Assistance Programs ("DCAPs"). Our administrative services are utilized by employers, health insurance providers and distributors of all sizes across the United States.

HSAs are tax-advantaged savings accounts that allow individuals the flexibility to pay for current health expenses and/or save for future health expenses. HSA eligibility is predicated on having a high deductible health care plan ("HDHP"), among other requirements. As employers increasingly offer HDHPs, many have paired them with HSAs that help both the employer and employee manage the rising costs of health care. HSAs are typically funded by pre-tax employer and employee contributions and the funds are held in a bank or other custodial account. HSA consumers may use their account to pay for qualified medical expenses as specified in Code section 213(d). Because HSAs are owned outright by the individual—including employer contributions from the time of deposit—employees make independent decisions around the disbursement, saving or investment of their HSA funds.

[2] *Id.*

II. Impact of Rule on HSAs

Under the Rule, the Department determined that the definition of an individual retirement account (IRA) includes any trust account defined under Code section 4975(e)(1)(B) through (F). As such, the Rule incorporates HSAs into the definition of an IRA. Consequently, the Rule imposes the same fiduciary standards on those administering HSAs as are imposed on an IRA advisor. Although HSAs may be used as long-term savings accounts for retiree health care expenses, and may have an associated investment account, the Department failed to recognize critical differences between an HSA and an IRA.

ConnectYourCare believes the Rule will have unintended consequences on the HSA marketplace by adding increased costs and liabilities for employers, plan sponsors, and administrators of these accounts. Most significantly, we believe the Rule will ultimately harm the HSA consumer as it will reduce access to HSAs and related educational information concerning these accounts while also increasing prices related to the administration of HSAs. These increased costs and added liability come at a time when employers and employees are facing rising health care costs and are putting more reliance on tools like HSAs to help manage these costs and encourage more consumerism in the health care market. Such unintended consequences are in direct contrast to the President's stated intent to empower Americans to manage their own financial decisions and to "build the individual wealth necessary to afford typical lifetime expenses."[3]

III. HSAs should be Exempt from the Rule

A fundamental flaw of the Rule is its sweeping incorporation of HSAs into the definition of IRAs. HSAs are distinguishable from IRAs and other retirement investment vehicles. By statutory definition, HSAs are trust or custodial accounts owned by the individual, not the employer, "exclusively for the purpose of paying qualified medical expenses."[4] HSAs provide the individual with a means to pay and/or save for current or future qualified medical expenses. Most HSAs have an attached payment card, allowing the individual to frequently access funds in the HSA to pay for eligible expenses at the individual's discretion. Therefore, HSAs are transactional in nature, unlike IRAs which function solely as a retirement savings instrument.

Although HSAs may be used to fund medical expenses throughout retirement, HSAs are generally low-balance accounts used by employees to help manage out-of-pocket costs in their current-year medical plans. According to a November 2016 report issued by the Employee Benefit Research Institute, the average HSA balance at the end of 2015 was $1,844.[5] In contrast,

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[3] *Id.*

[4] 26 U.S.C. 223(d)(1).

[5] Paul Fronstin, *Health Savings Account Balances, Contributions, Distributions, and Other Vital Statistics, 2015: Estimates from the EBRI HSA Database*, EBRI ISSUE BRIEF, no. 427 (Employee Benefit Research Institute, Wash., D.C.), Nov. 29, 2016, at 8.

the average balance in a 401(k) at the end of 2016 was $92,500 and the average balance in an IRA at the end of 2016 was $93,700.[6]

While HSAs generally have an investment component, investment of HSA funds is optional and determined by the HSA consumer. Recent research shows that few HSA consumers actually invest their HSA funds; less than 3% of accountholders utilize the investment feature.[7] These numbers demonstrate that HSAs are not being used by accountholders as retirement investment vehicles, but as a means to pay for current health expenses. Subjecting HSAs to the same regulatory fiduciary standards as IRAs is inappropriate given the contrast in the purpose and objectives of the accounts. The Rule would unnecessarily increase costs and impede a consumer's ability to manage their own health care spending and saving decisions.

Furthermore, the Department has previously acknowledged that HSAs are generally not subject to ERISA. In FAB 2004-01, the Department affirmed its belief that "HSAs generally will not constitute employee welfare benefit plans established or maintained by an employer where employer involvement with the HSA is limited, whether or not the employee's HDHP is sponsored by an employer or obtained as individual coverage." This position was restated in the Department's FAB 2006-2.

IV.) Recommendations

a.) *Exempt HSAs from the Rule*

ConnectYourCare strongly believes that HSAs should not be subject to the fiduciary standards as required under the Rule. As previously discussed, HSAs are inherently different from IRAs and the application of ERISA investment regulations is inappropriate to HSAs. The compliance costs associated with the Rule would be disproportionate and prohibitive for HSA administrators. Furthermore the creation of the Best Interest Contract ("BIC") standard would permit private litigation against HSA administrators, ultimately leading to limited communication and education flowing from the HSA administrator to the employers and HSA consumers.

b.) *Extend the Platform Provider Exception to HSAs*

In the absence of carving out HSAs from the Rule, the Department should consider extending the platform provider exception to HSAs. The Rule exempts service providers from being deemed a fiduciary solely based on providing plan sponsors with investment options available on the service provider's record keeping platform or website.[8] ConnectYourCare believes this exception should be modified to explicitly apply to HSAs.

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[6] Press Release, Fidelity Investments, Fidelity Retirement Analysis: 401(k) Balances, Contributions and IRAs End 2016 at Record Levels, FIDELITY INVESTMENTS, (Feb. 2, 2017), *available at* https://www.fidelity.com/about-fidelity/employer-services/2016-q4-retirement-update.
[7] Fronstin, *supra* note 5 at 8.
[8] Memorandum, *supra* note 1 at 9675.

HSA administrators offer an appropriate slate of investment options to participants that is, generally, standardized for all of the administrator's employer sponsored HSA arrangements. This type of standardized offering is in contrast to the Rule's contemplation of rendering fiduciary status when the administrator or service provider provides individualized or directed investment advice. In fact, the Department's prior guidance under FAB 2006-2 supports this exemption. In that guidance, the Department confirmed its view that the selection of a single HSA administrator offering a single investment option does not "constitute the making or influencing of an employee's investment decision giving rise to an ERISA-covered plan. . . ."[9]

HSAs, unlike IRAs, are generally offered to employees by employers in conjunction with employer sponsored health coverage. As such, employers or the exchange provider are generally responsible for selecting the HSA trustee or service provider to administer the accounts on behalf of the employees; and employers wield sophisticated bargaining power when selecting the HSA administrator.

V.) Conclusion

HSAs are an increasingly important tool to help Americans manage their health care spending decisions. Congress and the Administration have also recognized that HSAs are a central component to the future viability of the nation's health care policy. However, the Rule imposes unnecessary risks and compliance costs on HSA administrators while providing little to no protection to the HSA consumers. It is our belief that the Rule will force some HSA administrators to exit the marketplace, thereby inhibiting competition, or otherwise increasing costs to employers and employees utilizing HSAs.

ConnectYourCare believes that the Rule should be amended to exclude HSAs entirely, or amended to expand Platform Providers carve out to include HSA administrators. We appreciate the opportunity to provide comments on the Rule. Please do not hesitate to contact me with any questions.

Respectfully,

Harrison Stone
General Counsel

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[9] DEP'T OF LABOR, FAB 2006-2, HEALTH SAVINGS ACCOUNTS - ERISA Q&As (2006).