



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

Submitted via Federal eRulemaking Portal at www.regulations.gov

Re: RIN 1210-AB82, EBSA-2017-0004: Comments Regarding Application of Fiduciary Rule and Prohibited Transaction Exemptions to Health Savings Accounts

Dear Madam or Sir:

On July 6, 2017, the Department of Labor (“DOL”) 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 (“Code”), as a result of giving investment advice for a fee or other compensation with respect to assets or a plan or IRA (“Fiduciary Rule”).

UMB Bank, n.a. (“UMB”) appreciates the opportunity to submit comments to the DOL as it continues to review the Fiduciary Rule and the new or revised administrative class exemptions from the prohibited transaction provisions of ERISA and the Code (“Prohibited Transaction Exemptions”). UMB will provide comments in this letter on the application of the Fiduciary Rule and the Prohibited Transaction Exemptions to Health Savings Accounts (“HSAs”).

UMB is a subsidiary of UMB Financial Corporation, a mid-sized diversified financial services holding company headquartered in Kansas City, Missouri and serving customers across the entire country. Part of UMB’s diverse business model includes UMB Healthcare Services, which is one of the top HSA custodians in the nation.

UMB was one of the first financial institutions to provide HSA administration services directly to employees, employers, health plans, and third party benefit administrators. According to industry reports, UMB holds a five percent share of the nationwide HSA market, ranking fifth by number of accounts and sixth by deposits and investment assets. UMB is a member of several industry organizations, such as the Employers Council on Flexible Compensation, the American Bankers Association HSA Council, and America’s Health Insurance Plans, that are dedicated to the preservation and promotion of HSAs.

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The overwhelming majority of HSA accountholders use HSAs to pay current health care expenses. HSAs are established as health care accounts as a statutory requirement and are indispensable counterparts to High Deductible Health Plans. They are components of major medical insurance plans, unlike investment accounts that are established for that reason.

UMB believes that the Fiduciary Rule imposes unnecessary risks and expenses on HSA trustees and custodians with no material improvement for consumers. On the contrary, consumers may ultimately bear the cost of the Fiduciary Rule through increased fees and expenses. HSA costs may also rise further as smaller financial institutions withdraw from the HSA market due to real or perceived compliance and legal risks.

UMB recommends that the DOL exempt HSAs from the Fiduciary Rule. This exemption will promote robust competition among HSA trustees and custodians, reduce the costs of HSAs to employers and individuals, and allow HSAs to achieve their primary goal of creating a consumer market for medical care.

UMB proposes the following amendments and/or clarifications to the Fiduciary Rule:

1) The DOL Should Exclude HSAs from the Fiduciary Rule, as HSAs are Distinguishable from IRAs and Other Retirement Investment Arrangements.

Under Section 223 of the Code, HSAs are trust or custodial arrangements established “exclusively for the purpose of paying qualified medical expenses.” Unlike Individual Retirement Accounts (“IRAs”), which are investment-oriented retirement arrangements, HSAs serve as deposit arrangements maintained by accountholders to pay current health care expenses.

Congress, while incorporating some of the rules applicable to IRAs, recognized that HSAs are different, and thus subject to different rules. For example, while Congress incorporated certain prohibited transaction rules applicable to IRAs in ERISA Section 408(e)(2) and (e)(4), HSAs must be kept separate from retirement assets and may not be commingled with retirement assets, as is allowed for IRAs under ERISA Section 408(e)(6).

Likewise, in Field Assistance Bulletin No. 2006-02, the DOL acknowledged that even though HSAs are subject to the prohibited transaction rules, HSAs are significantly different from IRAs so as not to allow wholesale adoption of the IRA prohibited transaction exemptions. Further, unlike IRAs, HSAs do not accept rollovers from other types of retirement accounts regulated by ERISA, with the exception of a one-time transfer from an IRA to an HSA that is limited to the maximum annual

contribution limit for the HSA in that year. As a result, blanket application of the investment rules applicable to deferred compensation plans (and for that matter even IRAs) is inappropriate. The Fiduciary Rule should specifically exclude HSAs because these accounts operate more like retail accounts than depositories of retirement plan funds.



2) The DOL Should Clarify That the Fiduciary Rule Does Not Apply to HSA Deposit-Type Arrangements.

The DOL implicitly acknowledged that ERISA is ill-suited for application to HSAs when it adopted specific rules carving the vast majority of HSA arrangements out of ERISA coverage in Field Assistance Bulletins 2004-01 and 2006-02. Indeed, UMB is unaware of any HSA arrangements that are currently subject to ERISA regulation. This broad exception is fitting, as the vast majority of HSA assets (82%) are held in deposit-type arrangements. Given these circumstances, if the DOL does not exempt HSAs from the Fiduciary Rule, the DOL should alternatively clarify that the Fiduciary Rule is not applicable to HSA deposit-type arrangements.

These arrangements are already subject to federal and state banking requirements and regulations, and the imposition of an additional layer of regulation will unnecessarily increase costs and reduce effective rates of return. Congress has already concluded that imposing investment requirements is unnecessary to deposit-type arrangements (Code Section 4975(d)(4)). Consequently, the option to deposit HSA funds in two or more interest bearing accounts should not be considered “investments” or “investment advice” for purposes of the Fiduciary Rule. Choosing such an account is no different than choosing which checking account to establish – an activity in which virtually all HSA accountholders have sufficient experience.

Therefore, the investment protections need not be extended to such actions, and the DOL should clarify that the Fiduciary Rule does not apply to funds held in deposit arrangements with an HSA custodian or trustee.

3) The DOL Should Extend the Platform Provider Exception to HSAs.

Under the platform provider exception, service providers that offer a “platform” or selection of investment vehicles to participant-directed individual account ERISA plans do not provide investment advice by marketing or making available to a plan specific investment alternatives, 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. Thus, a service provider would not be considered a fiduciary by selecting and monitoring investment alternatives that it offers to participants, as well as identifying investment alternatives meeting objective criteria specified by the plan fiduciary or provide objective financial data regarding available alternatives to the plan fiduciary. Under the current Prohibited Transaction Exemptions, this exception does not extend to IRAs and other non-ERISA plans, such as HSAs.

Based on carefully-considered DOL guidance, it has been standard practice for employers to:

- Select an HSA custodian or trustee;



- Facilitate the opening of HSA accounts on behalf of employees to receive employer contributions;
- Fund the HSA with employer contributions;
- Limit payroll deductions and employer contributions to a selected HSA custodian/trustee;
- Pay HSA administration fees assessed by the custodian or trustee;
- Decide whether to offer its own 401(k) “menu” of investment options or allow the HSA custodian or trustee to offer a “menu” of investment options.

Notwithstanding this significant employer involvement, which might be considered an “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 DOL concluded that employee interests were adequately protected, in part because HSA assets could be readily withdrawn or transferred to another HSA.

In this unique role, employers wield sophisticated bargaining power more analogous to a commercial transaction between two informed companies. This is in stark contrast to the typical IRA arrangement where the employer has no involvement at all; indeed, employer contributions are prohibited for many employers. For these reasons, UMB believes that the platform provider exception should be modified to apply specifically to HSAs.

4) The DOL Should Clarify That HSA Trustees/Custodians Do Not Provide Individualized Investment Advice Merely by 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 Fiduciary Rule. Nonetheless, if the DOL determines that the Fiduciary Rule should be applicable to HSAs, the DOL should clarify that HSA trustees/custodians that provide a menu of investment options for employer groups are not providing individual investment advice.

In the preamble to the Fiduciary Rule, the DOL noted that it was intentionally moving 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 toward a more functional definition. See 81 Fed. Reg. 20956-7 (Apr. 8, 2016). 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.

Instructive in this regard is the DOL’s prior guidance under Field Assistance Bulletin 2006-02. In that guidance, the 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 its 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.

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. Thus, HSA trustees/custodians should not be seen as providing individualized investment advice merely by providing a menu of HSA investment options.

Thank you for considering UMB’s recommendations for modifying the Fiduciary Rule and the Prohibited Transaction Exemptions relating to HSAs. If the DOL has any questions regarding UMB’s recommendations or would like more information regarding HSAs, please contact me at 816-860-7906.

Sincerely,

A handwritten signature in black ink, appearing to read "Bogonya Klumb". The signature is fluid and cursive, with a large loop at the end.

Bogonya Klumb
Chief Executive Officer, UMB Healthcare Services
UMB Bank, n.a.