American Bankers Association
HSA Council

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Office of Exemption Determinations
Employee Benefits Security Administration
(Attention: D-11933), U.S. Department of Labor
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Ladies and Gentlemen:

The American Bankers Association's HSA Council represents about ninety-four percent of the Health Savings Accounts (HSA) in the United States and the millions of Americans who finance their healthcare with these plans. We appreciate the opportunity to respond to the Department's Request for Information as well as on the general questions of law and policy concerning the final rule and prohibited transaction exemptions. We have submitted written comments previously in response to the Department's proposed definition of a "fiduciary" under the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code as well as the proposed 60-day delay of the Applicability Date.

As we have argued previously, the Department should be aware that the overwhelming majority of HSA accountholders use these products for their intended purpose, which is to pay for current health care expenses. HSAs are established as health care accounts as a statutory requirement and as the indispensable counterpart to a High Deductible Health Plan (HDHP). They are a component of a major medical insurance plan, unlike investment accounts that are established for that reason.

Accordingly, HSAs are highly transactional, especially in the context of family coverage. Therefore, it is the position of the Council that the current version of the fiduciary rule imposes unnecessary risk and expense on HSA trustees and custodians with little to no material improvement for consumers.

To the contrary, consumers will ultimately bear the cost of the rule through increased fees and expenses. In the long run, costs will rise further as smaller financial institutions withdraw from the market due to real or perceived compliance and legal risks.

By exempting HSAs from the fiduciary rule, the DOL will help promote robust competition among HSA trustees and custodians, reduce their cost to employers and individuals, and allow

these instruments to achieve their primary goal of creating a consumer market for medical care.

We would like to reiterate our objection to HSAs being included in this rule and propose the following relief and/or clarifications to the final rule:

- **Exempt HSAs from the Rule as HSAs are Distinguishable from IRAs and Other Retirement Investment Arrangements.** Under Section 223 of the Code, Health Savings Accounts (or HSAs) are 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 arrangements maintained by accountholders for current health care expenses.

  Congress, while incorporating some of the rules applicable to IRAs, recognized that HSAs were different, 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 required to be kept separate from retirement assets and cannot be commingled with retirement asset (as is allowed for IRAs under Section 408(e)(6),

  Likewise, in FAB 2006-2, the Department 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). Further, unlike IRAs, HSAs do not accept rollovers from other types of retirement accounts regulated by ERISA. As a result, blanket application of the investment rules applicable to deferred compensation plans (and for that matter even IRAs) is inappropriate. The final rule should specifically exclude HSAs since HSA accounts operate more like retail 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 HSA arrangements out of ERISA coverage in FAB 2004-1 and 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 (82%) are held in 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 rate of return. Congress has already concluded that imposition of investment requirements is unnecessary to deposit-type arrangements (IRC 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 investment protections need not be extended to such actions and language should be added to clarify that the final rule does not apply to funds held in deposit arrangements with an HSA custodian or trustee.

Based on this carefully considered Department 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 "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 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 atypical IRA arrangement where the employer has no involvement at all (indeed employer contributions are prohibited for many employers). We believe that the platform provider exception should be modified to specifically apply to HSAs. In the alternative, this carve-out should be amended to exclude HSAs from the new investment rules when an employer has selected an HSA provider.

- **The Final Rule 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 proposed rule. Nonetheless, even if the final rules are applicable to HSAs, HSA trustees/custodians that provide a menu of investment options for employer groups are not providing individual 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. [Cite to 21935] 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 Department's prior guidance under FAB 2006-2. In that guidance, the Department 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).

We look forward to hearing from you about these proposals. Please do not hesitate to contact me if you have any questions about our proposed changes to the final rule.

Respectfully,

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