

**America's Health
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August 7, 2017

U.S. Department of Labor
Employee Benefits Security Administration
200 Constitution Avenue N.W.
Suite 400
Washington, D.C. 20210

Submitted electronically via www.regulations.gov

**RE: RFI 1210AB82, EBSA-2017-0004: Comments Regarding Application of
Fiduciary Rule and Prohibited Transaction Exemptions to Health Savings Accounts
(Questions 15 & 18)**

Dear Sir or Madam:

On July 6, 2017, the Department of Labor (DOL) published a Request for Information related to an evaluation of the final rule defining the agents who act as 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) when they give investment advice with respect to a benefit plan or Individual Retirement Act (Fiduciary Rule).

America's Health Insurance Plans (AHIP) is the national association whose members provide coverage for health care and related services to millions of Americans every day. Through these offerings, we improve and protect the health and financial security of consumers, families, businesses, communities and the nation. We are committed to market-based solutions and public-private partnerships that improve affordability, value, access and well-being for consumers.

We appreciate the opportunity to contribute our perspective as the rule is examined, particularly with respect to exemptions for Health Savings Accounts (HSAs). Specifically, we offer these recommendations in response to Questions 15 and 18. Health Savings Accounts are an increasingly popular option for millions of American taxpayers seeking greater freedom and control over their health care expenses. They provide a tax-advantaged vehicle for paying health costs not covered by a medical expense plan and are necessary counterparts to High Deductible Health Plans (HDHP). Indeed, under current law, they can only be established in conjunction with a HDHP, making them components of a health plan rather than an investment account that is established independently and solely for the purpose of investing capital.

AHIP recommends that DOL exempt HSAs from the Fiduciary Rule. By exempting HSAs from the rule, the costs to employers, administrators, and consumers alike will be reduced and HSAs

August 7, 2017

Page 2

may serve their primary purpose of encouraging consumer choice in the market for health care. Our primary recommendation follows, along with two alternative clarifications requested should DOL determine that the Fiduciary Rule applies to these accounts to some extent.

1. DOL Should Exclude HSAs from the Fiduciary Rule as they are Distinguishable from IRAs and Retirement Investment Vehicles

HSAs serve solely as deposit arrangements maintained by account holders to pay for health care expenses incurred. Congress recognized that HSAs are distinct from IRAs and should be governed by distinct rules. Under ERISA, different rules already apply to HSAs versus IRAs. One key statutory distinction is ERISA Section 408(e)(6), which allows the commingling of retirement assets in an IRA. HSAs are prohibited from commingling with retirement assets. HSAs are not the depositories of retirement plan funds, but rather operate more as retail accounts, and therefore their distinct nature should warrant exclusion from the Fiduciary Rule.

2. Alternatively, the Fiduciary Rule Should Not Apply to HSA Deposits held with a Custodian or Trustee

DOL has already carved out nearly all HSA arrangements from ERISA, first in Field Assistance Bulletin 2004-01 and later in Field Assistance Bulletin 2006-02. These bulletins appear to be DOL acknowledging that ERISA should not apply to HSAs, which makes sense given that HSA assets are generally held as deposit arrangements. Should DOL decide to not exempt HSAs from the entire Fiduciary Rule, it should alternatively clarify that the rule is not applicable to HSA deposit-type arrangements. Such arrangements are subject to federal and state banking laws and regulations, including federal oversight by the Department of the Treasury and Office of the Comptroller of the Currency; adding additional layers of regulation only increase costs.

Beyond the deposit arrangement being excepted from the Fiduciary Rule, should DOL not exempt HSAs entirely, the Department should clarify that the trustees and/or custodians who provide the menu of investment options for employer groups offerings HSAs are not providing individual investment advice that would be subject to the Fiduciary Rule. The key elements of the definition of fiduciary status under 81 Fed. Reg. 20956-7 (April 8, 2016) are: (1) the provision of investment advice; that (2) is individualized or directed to a specific individual. HSA custodians and trustees provide a menu of investment options available to entire groups of HSA enrollees. Typically, these are mutual funds regulated under the Investment Company Act of 1940. HSA trustees and custodians supplying a menu of investment options are not offering advice that is individual or directed at a specific person.

3. The Platform Provider Exception of the Prohibited Transaction Exemptions Should be Modified to Include HSAs

The platform provider exception clarifies that when providers who offer a platform to select investment vehicles, they are not providing investment advice so long as they disclose in writing

August 7, 2017

Page 3

to participants that they are not providing investment advice in a fiduciary capacity. Current guidance does not extend this exceptions to HSAs, and given the nature of HSA platforms, DOL should clarify that the exception applies to these accounts.

Thank you for considering AHIP's recommendations on modifications to the Fiduciary Rule and Prohibition Transaction Exemptions as they relate to HSAs. We believe these approaches will allow consumers to have greater access and control over funds to pay for health costs, while minimizing burdens and unnecessary costs. We look forward to offering any future thoughts on these subjects as DOL begins implementation of this rule.

Sincerely,



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