

August 7, 2017

**By e-mail (EBSA.FiduciaryRuleExamination@dol.gov) and  
First Class Mail**

Office of Exemption Determinations  
Employee Benefits Security Administration  
Attention: D-11933  
United States Department of Labor  
200 Constitution Avenue, NW, Suite 400  
Washington, DC 20210

**Re: RIN 1210-AB82  
(Request for Information Regarding Fiduciary Rule and Prohibited  
Transactions)**

Ladies and Gentlemen:

HealthEquity<sup>1</sup> is pleased to respond to the Department of Labor's Request for Information Regarding the Fiduciary Rule and Prohibited Transactions, RIN 1210-AB82 (the "RFI"). The RFI was published in the *Federal Register* on July 6, 2017. We are responding to Question 15 of the RFI, which asks whether there should be an amendment to the fiduciary rule (29 C.F.R. § 2510.3-21, the "Final Rule") or a streamlined exemption for particular classes of investment transactions involving health savings accounts ("HSAs").

*As detailed in this letter, we respectfully request  
clarification on how the Final Rule applies to the  
marketing of HSAs.*

**About HealthEquity and its HSA Platform**

HealthEquity is a nonbank custodian of HSAs. We are approved by the IRS to serve as a nonbank trustee or custodian of HSAs under Code § 223(d)(1)(B). As of January 2017, we serve as custodian and administrator of approximately 2.7 million

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<sup>1</sup> HealthEquity includes Health Equity, Inc. and its subsidiaries. For the sake of simplicity, we refer in this letter to HealthEquity as a controlled group, without distinction between specific legal entities.

HSAs with approximately \$5.2 billion of assets. We are the largest nonbank custodian of HSAs, and second largest custodian overall, by accounts, according to market statistics from Devenir Research. Our wholly owned subsidiaries include HealthEquity Advisors, LLC, an SEC registered investment advisory firm, which regularly reviews the securities available on our platform and provides investment advice to individual account holders (whom we call HSA Members) who subscribe for this service; HealthEquity Trust Company, a non-depository trust company (subject to state banking regulation) that custodies securities held by HSA Members; and HealthEquity Retirement Services, LLC, which administers and acts as a fiduciary of employer-sponsored defined contribution pension plans. There are approximately 35,000 employers and 87 health insurance issuers (all of whom we call Partners), working with us to help their employees and insureds open, fund and effectively use HSAs.

### **Request for Clarification**

In the Final Rule, the Department declined to provide a special carve-out for HSAs.<sup>2</sup> We believe HSAs can be an important tool for millions of Americans to save and therefore applaud the Department's effort to ensure that the budding HSA industry grows in a way that is truly in the interest of investors. We embrace our fiduciary responsibilities, and in that spirit respectfully request additional clarity on the Final Rule's application, particularly in distinguishing non-fiduciary marketing activities from fiduciary investment advice.

We believe clarity is needed because safe harbors in the Final Rule that cover common marketing and sales activities do not apply for the vast majority of HSAs. In particular, the "platform provider" exception<sup>3</sup> and the exception for transactions with sophisticated independent fiduciaries<sup>4</sup> each require that the marketer or seller interact with a qualified fiduciary. Although HSAs are often a component of employers' benefit programs, they are almost always structured as individual accounts that are not subject to ERISA (as permitted by Field Assistance Bulletins 2006-02 and 2004-01). Consequently, it is rarely possible for a party that is marketing an HSA to deal with a qualified fiduciary.

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<sup>2</sup> See 81 Fed. Reg. 20945, 20962 (Apr. 8, 2016) ("investment property" does not include insurance policies "to the extent that they do not include an investment component"); *id.* at 20989 (discussing decision to include HSAs in the Final Rule).

<sup>3</sup> 29 C.F.R. § 2510.3-21(b)(2)(i).

<sup>4</sup> 29 C.F.R. § 2510.3-21(c)(1).

In addition, the Final Rule's express carve-out for general communications is of limited utility because it does not appear to cover one-on-one marketing or marketing to small groups.<sup>5</sup> This limitation creates questions for common sales and marketing activities in which we and other HSA providers engage. Similarly, the application of the Final Rule's "hire me" exception is uncertain for HSAs because the preamble to the Final Rule warns that a recommendation to "hire me" could be treated as investment advice if it "effectively includes a recommendation on how to invest or manage plan or IRA assets." As an example, the preamble says a recommendation "whether to roll assets into an IRA or plan" could be investment advice.<sup>6</sup>

Furthermore, marketing and delivery of HSAs to individual account holders may involve interactions among a number of parties beyond the HSA custodian, including employers, health insurance issuers/administrators, third-party benefits administrators (TPAs) and health insurance brokers. We are concerned that actions by any one of these parties that are common in benefits services could be treated as investment advice under the Final Rule with respect to HSAs. We therefore respectfully request that the Department address the following scenarios:

- An HSA custodian markets its services, including an investment platform, to employers, health benefits issuers/administrators and other parties. Presentations about HSA services typically include information about the custodian's administrative services to the employer and to account holders, and the custodian's ability to coordinate with the employer's TPA or issuer/administrator and other benefits vendors. It is also common to describe how cash is held pending an individual's investment election, such as in an interest-bearing account at an FDIC-insured depository institution, and to provide an overview of the platform for investing HSA funds. A presentation might likewise describe the investment funds available on the platform, including fees, and the fact that the investment options are selected and monitored by an investment adviser; and it might describe any option for individualized investment advice, including the fees charged for this additional service. However, a typical presentation of this sort would not include advice on investment allocation for any particular individual; nor would it make claims about the effectiveness of advice rendered by the investment adviser. We believe, and respectfully request that the Department confirm, that activities of the custodian of this nature do not constitute investment advice subject to fiduciary responsibility under the Final Rule.

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<sup>5</sup> See 29 C.F.R. § 2510.3-21(b)(2)(iii).

<sup>6</sup> 81 Fed. Reg. at 20968.

- Employers who offer HSA-qualified health benefits frequently make the offerings of an HSA custodian available to their employees. Typically, employers receive no compensation, directly or indirectly, based on selection of the HSA custodian. Nor do employers have or represent themselves to have control, direction or influence over the employee's HSA. In accordance with the Department's guidance,<sup>7</sup> employers typically provide to employees general information about the HSA and the designated custodian's services, facilitate the opening of HSAs, and contribute and/or facilitate payroll contributions. Employers may facilitate the transfer or rollover of funds by employees from other HSA custodians (*e.g.*, those with whom the employer previously partnered). Employers may distribute rollover forms and other materials provided by the custodian, or provide an electronic method for employees to authorize a rollover or transfer within benefits enrollment systems. Employers may facilitate data exchange and single sign-on access among the designated custodian and other health and retirement benefits administrators. We believe, and respectfully request the Department to confirm, that activities of the employer of this nature do not constitute investment advice subject to fiduciary responsibility.
- Similarly, health insurance issuers/administrators and TPAs who offer HSA-qualified health insurance and administrative services frequently make the offerings of an HSA custodian available to their clients (employers and/or individual insureds) and engage in activities similar to those described above. Typically, compensation (direct and indirect) that issuers/administrators receive is not affected by selection of the HSA custodian. Nor do issuers/administrators have or represent themselves to have control, direction or influence over the HSA. We believe, and respectfully request that the Department confirm, that these activities of the health insurance issuer/administrator generally do not constitute investment advice subject to fiduciary responsibility under the Final Rule.
- In some cases, health insurance issuers/administrators and TPAs do receive compensation, such as a fee per account or debit card interchange sharing, based on selection of the HSA custodian. These issuers and administrators may have a significant level of control, direction or influence over the HSA. For example, they may represent the HSA as their own product and/or bundle the HSA with other products. Similarly, TPAs may select an HSA custodian to "integrate" into their services, receiving compensation and exercising significant control,

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<sup>7</sup> See Field Assist. Bull. 2006-02 (Oct. 27, 2006); Field Assist. Bull. 2004-01 (Apr. 7, 2004).

direction or influence over the HSA. We respectfully request that the Department clarify whether and under what circumstances these activities of a health issuer/administrator or TPA may constitute investment advice giving rise to fiduciary responsibility under the Final Rule.

- Employers frequently rely on health benefits brokers' or advisors' recommendations with respect to the selection of an HSA custodian. On the employer's behalf, brokers may provide general information about the HSA and the designated custodian's services to employees, and they may facilitate the opening of HSAs, payroll contributions, rollovers, etc. Brokers frequently receive compensation based on the selection of the HSA custodian (or based on the selection of a health insurance issuer/administrator or TPA, who in turn receives compensation based on its selection of the HSA custodian). We respectfully request that the Department clarify whether and under what circumstances these activities of a health benefits broker or advisor may constitute investment advice giving rise to fiduciary responsibility under the Final Rule.
- Finally, in considering its responses to the questions raised in this letter, we respectfully urge the Department to clarify how paragraph (g)(4) of the Final Rule applies to HSA-qualified health insurance plans, as they are often coordinated with HSAs. Paragraph (g)(4) excludes from the definition of investment property subject to the Final Rule, "health insurance policies . . . and other property to the extent the policies or property do not contain an investment component." Are there circumstances under which this exclusion ceases to apply—for example, where a health insurance issuer/administrator is affiliated with the HSA custodian, or the issuer/administrator bundles insurance and investment products and/or serves them with common personnel? We believe investors should have the ability to understand the distinction between investment products that are subject to the protections of the Final Rule and other products, including health insurance, that are not subject to those protections.

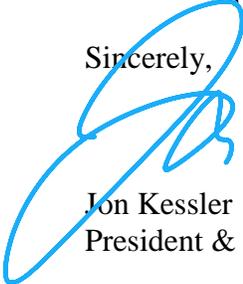
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We appreciate the opportunity to respond to the Department's RFI. We would welcome an opportunity to discuss our requests for clarification in more detail and to work with the Department to address concerns in a constructive way.

Sincerely,



Jon Kessler  
President & CEO