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August 7, 2017

Mr. Brian Shiker
Office of Exemption Determinations
EBSA, (Attention: D-11933)
U.S. Department of Labor
200 Constitution Avenue NW., Suite 400
Washington, DC 20210

Attention: Fiduciary Rule Examination (RIN 1210-AB82)

Dear Mr. Shiker:

The Department of Labor (DOL) issued its final fiduciary rule on April 8, 2016. As part of that rule, it defined Individual Retirement Accounts (IRAs) to include Health Savings Accounts (HSAs). Following a delay, a portion of the rule became effective on June 9, 2017, with the balance to become effective on January 1, 2018. On July 6, 2017, the Employee Benefits Security Administration issued a request for information seeking public input that could form the basis of new exemptions or changes/revisions to the rule and PTEs. This comment requests an exemption from the fiduciary rule for HSAs.

The Obama administration's Council of Economic Advisers (CEA) estimated the cost of conflicted advice at $17 billion a year. That research focused on rollovers from 401(k) plans to IRAs. It found that the average IRA rollover for individuals 55 to 64 in 2012 was more than $100,000, and concluded that a retiree who receives conflicted advice when rolling over a 401(k) balance to an IRA at retirement will lose an estimated 12 percent of the value of his or her savings. President Obama relied on this report to direct the Department of Labor to move forward with the rule.

Whether these estimates of cost savings are accurate are immaterial to HSAs. Based on its book of business of nearly 2.5 million accounts, only 3.8% of accountholders at HSA Bank take advantage of self-directed investment options in no-load mutual funds or through a brokerage window. Consistent with industry averages, the average account balance is only

$2,280, and account balances have remained stable for the past five years. This is because the vast majorities of HSA accountholders use these arrangements as spending accounts to pay for the increasingly unsustainable cost of medical care.

The report from the Council of Economic Advisors made no reference to HSAs. Congress defined the term "health savings account" to mean "a trust created or organized in the United States as a health savings account exclusively for the purpose of paying the qualified medical expenses of the account beneficiary. . .." HSAs may not receive rollovers from 401(k)s, they are subject to annual contribution limits, they are typically spent down rather than invested, and attract little notice from "conflicted brokers."

In the Preamble to the final rule, the DOL acknowledges that only 3% of HSA accountholders invest any portion of their balance. They assert that these 3% are entitled to the same protections as IRA owners, but fail to acknowledge that the cost for compliance will be borne by 100% of HSA accountholders, including the 97% who merely hold their funds in an interest-bearing cash account. Neither the Council of Economic Advisors, the DOL's Fiduciary Investment Advice Regulatory Impact Analysis, or any other government study applies a cost-benefit analysis to expanding the definition of "IRA" to include HSAs, which are fundamentally different arrangements. Given the tiny fraction of investors, the relatively small balance of those who invest, and standard industry practices among HSA custodians, HSA accountholders have no significant risk of receiving conflicted advice, and no studies have been cited by the federal government to the contrary.

Successful HSA custodians offer well-managed administrative platforms that compete effectively on price and service. Though they may offer retail HSAs to individuals, the vast majority of accounts are established through employers and funded by payroll deduction. Employers compete for employees by offering superior pay and benefits. Although the DOL acknowledges that employers are not fiduciaries when they select an HSA custodian (even where a custodian matches the employer's 401(k) fund lineup), the desire of employers to provide competitive benefits ensures that available investments for HSAs are not overpriced. There is simply no comparison to the market conditions that exist where an individual retires and rolls $100,000 out of a 401(k) subject to ERISA and into a self-directed IRA.

On February 3, 2017, President Trump issued a Presidential Memorandum on the Fiduciary Rule. That memorandum directed the DOL to examine the fiduciary rule to determine whether it may adversely affect the ability of Americans to gain access to retirement information and financial advice. As part of this examination, the DOL was directed to consider the following:

(i) Whether the anticipated applicability of the Fiduciary Duty Rule has harmed or is likely to harm investors due to a reduction of Americans' access to certain retirement savings offerings, retirement product structures, retirement savings information, or related financial advice;

(ii) Whether the anticipated applicability of the Fiduciary Duty Rule has resulted in dislocations or disruptions within the retirement services industry that may adversely affect investors or retirees; and

(iii) Whether the Fiduciary Duty 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.

HSA Custodians understand that 97% of accountholders only use their accounts as a spending account. If the DOL imposes the fiduciary rule on HSA custodians, 97% of the associated compliance costs, which are significant, will ultimately be borne by accountholders who do not invest. This will create competitive pressure within the industry to offer less expensive HSAs without investment options, in contravention to items (i) and (ii) of the Presidential Memorandum above.

This cannot be the DOL's objective. A recent study by Health View Services estimates a healthy 65-year-old couple retiring today can expect to pay over $400,000 (not adjusted for inflation) in healthcare expenses alone during retirement when taking into account

Medicare Parts B and D, supplemental insurance, dental and vision insurance, deductibles, copays and other out-of-pocket healthcare costs. It's expected that these expenses will increase by an average of 5.5 percent per year during retirement, twice the U.S. inflation rate. At the same time, 29 percent of Americans 55 and older don't have any retirement savings. Though few HSA accountholder invest today, every effort should be made to preserve these options and promote their use.

Item (iii) of the Presidential Memorandum is likely found across the retirement service industry. The key differential for HSAs is that these costs will be borne without a corresponding benefit. Given their purpose, small size, the tiny fraction of accountholders who invest, and investment platforms designed to appeal to sophisticated large employers who compete for employees with superior benefits, the cost of this regulation manifestly outweighs any theoretical benefit that may accrue to 1 in 1,000 individuals.

In conclusion, HSA Bank requests that the DOL reconsider its definition of IRAs to include HSAs, exclude HSAs from the fiduciary rule, and retain all prior prohibited transaction exemptions with respect to HSAs.

HSA Bank also supports and agrees with comments submitted under rule by Kevin A. McKechnie on behalf the American Bankers Association HSA Council on April 17, 2017 (Mr. McKechnie also requested exemption of HSAs from the rule).

Sincerely yours,
HSA Bank, a division of Webster Bank, N.A.

Charles Wilkins
Head of HSA Bank