The Honorable Julie A. Su
Acting Secretary of Labor
The Honorable Lisa M. Gomez
Assistant Secretary
Office of Regulations and Interpretations,
Employee Benefits Security Administration, Room N–5655
U.S. Department of Labor
200 Constitution Ave. NW, Washington, DC 20210

*Submitted Electronically Via Federal eRulemaking Portal: www.regulations.gov*

**Re:** Attention: RIN 1210–AC02: Definition of an Investment Advice Fiduciary ("Proposed Rule") and Application No. D. 12057, ZRIN 1210-ZA32, Proposed Amendment to Prohibited Transaction Exemption 2020-02 ("Proposed Exemption") as applied to IRS-Approved Nonbank Trustees

Dear Secretary Su and Assistant Secretary Gomez:

Acclaris, Inc., an IRS-approved nonbank trustee with regard to Health Savings Accounts ("HSAs"), submits this comment to the Department of Labor commenting on the above-referenced Proposed Rule and Proposed Exemption. Please note that we have submitted this same comment twice, using the identifiers of both the Proposed Rule and Proposed Exemption, as this comment relates to both.

While we agree with other commenters that the proposed revisions to the definition of an investment advice fiduciary are too broad, at least in the context of HSAs[1], the primary purpose of this letter is to raise to your attention what we believe may have been an oversight. Simply put, we note that in the Proposed Exemption 2020-02, IRS-approved nonbank trustees are not expressly included in the list of entities that are eligible for relief as "Financial Institutions." In this letter, we ask the Department to clarify that IRS-approved nonbank trustees are eligible for the relief provided by the Proposed Exemption by expanding the definition of "Financial Institution" to include IRS-approved nonbank trustees.

On November 3, 2023, the Department of Labor ("DOL") released the Proposed Rule regarding who is an investment advice fiduciary for purposes of the Employee Retirement Income Security Act ("ERISA") and the Internal Revenue Code ("Code"). The Proposed Rule applies to HSAs and confirms that entities that receive compensation in connection with investment recommendations will be considered fiduciaries for purposes of the applicable ERISA and tax provisions. The Proposed Rule includes the Proposed Exemption (PTE 2020-02 as modified), which allows (subject to specified safeguards) investment fiduciaries to continue to provide services and receive compensation in connection with those services.

At the risk of oversimplifying, the Proposed Rule expands the definition of fiduciary to pick up entities that impact or influence investment decisions and receive compensation in connection with the investment. The new definition is expansive and may apply whenever compensation is received in

[1] Such an expansion seems especially concerning when applied to non-invested cash retained by custodians or trustees in an HSA account.

connection with an HSA-related investment arrangement. If an entity is deemed to be an investment fiduciary, it would be a prohibited transaction for it to receive any compensation in connection with the investment recommendation unless it satisfies the prohibited transaction exemption. In this regard, DOL appropriately provided the Proposed Exemption, which allows for compensation to be received provided the entity satisfies the newly revised "Best Interest" requirements. Unfortunately, the Proposed Exemption is only available to "Financial Institutions," which are defined to include banks, insurers, and entities regulated by the SEC (brokers, RIAs, etc.), but does not include IRS-approved and regulated nonbank trustees[2]. As a result, if the Proposed Exemption is not modified, IRS-approved nonbank trustees will be unable to earn any compensation in connection with HSA investments and presumably will all be forced to go out of business.

***Failure to include nonbank trustees under Proposed Exemption is apparent oversight***

As stated above, the expanded definition of fiduciary under the Proposed Rule will pull many IRS-approved nonbank trustees within the definition of fiduciary, yet not allow such entities the same approved process to conduct business under the Proposed Exemption as is accorded to other similar financial institutions. Indeed, DOL has asked for comments on whether the list of entities that are eligible for the exemption is appropriate, including whether the list should be expanded. DOL did not mention IRS-approved nonbank trustees in either of the Proposed Rule or the Proposed Exemption or the commentary surrounding this issue,[3] leading us to believe that this may have been a simple oversight. As addressed more fully herein, we believe that Congress intended that IRS approved HSA nonbank trustees should be eligible for this PTE, just as other financial institutions are eligible. Moreover, IRS has clearly been vested with authority to regulate the activities of NBTs to ensure that safeguards similar to those applicable to other financial institutions apply. We are asking the DOL to address this apparent unintentional oversight in the applicability of PTE 2020-02 and to define "financial institution" for purposes of the Proposed Exemption to include IRS-approved nonbank trustees or to otherwise clarify that IRS-approved nonbank trustees are eligible for the Proposed Exemption.

***IRS-approved nonbank trustees (NBTs) are subject to strict scrutiny for IRS approval and ongoing oversight***

IRS-approved nonbank trustees must be approved by the Internal Revenue Service and meet the requirements of the Internal Revenue Code, Treasury Regulations, and IRS guidance.[4] Congress clearly intended that, if approved, nonbank trustees should be viewed the same under ERISA and the Internal

[2] We use the term "nonbank trustee" here to include both nonbank trustees and nonbank custodians as such entities are treated the same under applicable law.

[3] We note that the Department failed to include any analysis of the Proposed Rule's and the Proposed Exemption's economic impact on IRS-approved nonbank trustee HSA providers, including small entities that may provide such services, further bolstering our conclusion that this impact was a mere oversight.

[4]Previously, the DOL considered but declined to include mere recordkeepers in its definition of Financial Institution for the purpose of this prohibited transaction exemption. The DOL stated, "The Department does not believe a recordkeeper that is not also a bank, broker-dealer, insurance company, or registered investment adviser would have the requisite regulatory oversight to necessarily act as a Financial Institution." 85 Fed. R. 82798, 82814 (Dec. 18, 2020).Based on the additional scrutiny and oversight applicable to nonbank trustees, we feel that such entities should be treated like Financial Institutions for purposes of the PTE.

Revenue Code for IRA and HSA purposes as financial institutions and insurers.[5] This is evident in the Congressional mandate provided to IRS at the time of enactment of ERISA.

To obtain the IRS's approval to serve as a nonbank trustee, the nonbank trustee must file a comprehensive application with the IRS that establishes that the nonbank trustee is able to satisfy the same standards that financial institutions and insurers are otherwise expected to satisfy by virtue of the regulatory framework in which they exist. The application with the IRS must establish:

- Experience handling funds in a fiduciary capacity;
- Business continuity and assurance it can perform its fiduciary duties uninterrupted;
- Financial responsibility by showing a high degree of solvency that is demonstrated by a review of the applicant's financial statements focusing on net worth, liquidity and payment of debts as they come due;
- Its experience and competence in accounting for a large number of individual accounts, including calculating and allocating earnings and making distributions to payees;
- Its experience and competence with respect to activities normally associated with the handling of retirement funds;
- Written documentation for the rules of fiduciary conduct to be used in administering accounts. The rules require:
    - Owners or directors to be responsible for the proper exercise of fiduciary powers;
    - Maintenance of a written record of the acceptance or relinquishment of fiduciary;
    - To determine once a year the advisability of holding or selling assets if the applicant has authority to render investment advice;
    - All employees to be adequately bonded;
    - Retention of legal counsel readily available to pass upon fiduciary matters;
    - Maintenance of a separate trust division;
    - Valuation of trust assets once in a calendar year and at least every 18 months between valuation;
    - A net worth greater than a specified level before accepting fiduciary accounts;
    - Maintenance of a minimum level of net worth;
    - Performance of a detailed audit by a qualified public accountant once every 12 months;
    - Maintenance of fiduciary records separate from all other records.
- A fidelity bond that ensures all employees taking part in the performance of fiduciary duties are adequately bonded with a minimum bond amount of at least $250,000; and

[5] Note: the relevant HSA and MSA nonbank trustee provisions are the same as those initially adopted under ERISA for IRAs. See House Ways and Means report, House Rept. No. 93-807, Feb. 21, 1974 (to accompany HR 12855), p. 133-34 "Under the governing instrument, the trustee of an individual retirement account generally is to be a bank (described in sec. 401(d) (1) ). In addition, a person who is not a bank may be a trustee if he demonstrates to the satisfaction of the Secretary of the Treasury that the way in which he will administer the trust will be consistent with the requirements of the rules governing individual retirement accounts. ***It is contemplated that under this provision the Secretary of the Treasury generally will require evidence from applicants of their ability to act within accepted rules of fiduciary conduct with respect to the handling of other people's money; evidence of experience and competence with respect to accounting for the interests of a large number of participants, including calculating and allocating income earned and paying out distributions to participants and beneficiaries; and evidence of other activities normally associated with the handling of retirement funds*****.** p. 134. See also Senate Report no. 99-383, Aug. 21, 1973 (to accompany S. 1179).

- An initial net worth of at least $250,000 based on the most recent audited financial statements.[6]

The IRS is charged with regularly auditing nonbank trustees to ensure their ongoing compliance. In this regard, the IRS considers additional documents during its ongoing compliance investigations. Those documents include any list of stockholders with their percentage of ownership, copies of several Form(s) 1099-R that were issued for the most recent taxable year, by-laws, operating procedures or other controlling document that contains the rules of fiduciary conduct, the bond covering all employees taking part in the performance of the nonbank trustee's fiduciary duties, a copy of the nonbank trustee's balance sheet with auditor's comment showing net worth and, a copy of the auditor's valuation of the fiduciary accounts and the copy of the auditor's report of the fiduciary books and records.[7]

In light of the foregoing, we believe that nonbank trustees approved by the IRS should be accorded the same eligibility for relief under the Proposed Exemption as other similarly regulated Financial Institutions.

***IRS-approved nonbank trustees make up a significant portion of the current HSA trustees and custodians***

Nonbank trustees make up a significant portion of all HSA trustees. In mid-2023 HSAs had approximately $116 billion of assets in approximately 36 million accounts.[8] Of this, nonbank trustees are responsible for a considerable share of those assets and accounts. The failure to include nonbank trustees in the exemption will remove from the market the many nonbank trustees who service HSA account holders. The exclusion of nonbank trustees would result in widespread confusion among employers and consumers who must find new HSA providers and take action to transfer their HSA to a new trustee. The exit of nonbank trustees from the marketplace would undoubtedly harm the HSA account holders that the 2023 Proposed Rule is intended to protect. Ultimately, individual accountholders will be left with fewer choices and less competition for their business, which might result in individuals paying higher fees and costs that reduce the amount they have available to pay medical expenses.

***HSA nonbank trustees need to be added to the definition of Financial Institution like their insurer and bank HSA trustee counterparts to remain operational and avoid harm to individual accountholders who rely on the nonbank trustees that serve a significant portion of all HSAs***

The failure to treat HSA nonbank trustees like insurers and banks that are HSA trustees for purposes of the Proposed Exemption will cause nonbank trustees to be unable to earn reasonable compensation that they rely on to stay viable. More importantly, failure to include them in the definition would treat nonbank trustees approved by the IRS differently than financial institutions and insurers for HSA purposes, which would be inconsistent with the clear intent of Congress that chose to regulate such entities similarly for purposes of ERISA and the Code. Ultimately, individual accountholders will suffer

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[6] Treasury Regulation Section 1.408-2(e); Revenue Procedure 2023-4, Section 3.07; Internal Revenue Manual, Nonbank Trustee Investigation Procedures, Section 4.72.18; https://www.irs.gov/retirement-plans/application-procedures-for-nonbank-trustees-and-custodians (last visited December 7, 2023).

[7] Internal Revenue Manual, Nonbank Trustee Investigation Procedures, Section 4.72.18.

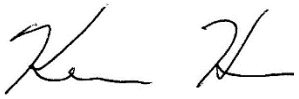
[8] 2023 Midyear Devenir HSA Research Report, available at https://www.devenir.com/research/2023-midyear-devenir-hsa-research-report/ (last visited December 5, 2023).

because they have fewer HSA service provider options[9] and face potential delays in accessing their accounts due the sudden surge in HSAs that insurers and banks must absorb without appropriate staffing and resources.

Congress has created nonbank trustees and authorized them to serve as HSA custodians and trustees just like banks and other financial institutions. Congress has empowered the IRS with determining initial nonbank trustee status through its approval process, as well as conducting regular ongoing compliance investigations for all approved nonbank trustees. Through this Congressionally approved process, nonbank trustees are required to adopt a fiduciary code of conduct and demonstrate their experience and ability to serve in a fiduciary capacity. Accordingly, HSA nonbank trustees should be accorded the same opportunity to avail themselves of PTE 2020-02 as banks and other Financial Institutions.

Thank you for your consideration of our comment. If the Department has any questions or is otherwise interested in discussing our concerns, we would happily participate in a meeting or call at your convenience. Please contact Paul Hilliar, Head of Government Relations, at paul.hilliar@wtwco.com if you have questions and would like to discuss the recommendations that we have presented.

Sincerely,



Kevin House

President and CEO of Acclaris, Inc.

[9] A recent Morningstar Report indicated that the largest four HSA custodians accounted for over 66% of the total market. Failure to provide the Proposed Exemption for nonbank trustees could consolidate the market further.