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May 2, 2019

Mr. Robert E. Feldman
Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Re: Unsafe and Unsound Banking Practices: Brokered Deposits and Interest Rate Restrictions (RIN 3064-AE94)

Dear Mr. Feldman:

HealthEquity, Inc. (HealthEquity) appreciates the opportunity to provide comments in response to the Federal Deposit Insurance Corporation's (FDIC) advanced notice of proposed rulemaking (ANPR) and request for comments[1] on the agency's brokered deposit regulation.[2] HealthEquity is the largest Treasury-certified non-bank custodian of health savings accounts (HSAs). We respectfully request clarification that HSAs and Treasury-certified trustees and custodians of HSAs are not subject to the brokered deposit rules. This clarification is appropriate because HSAs are an integral component of employee benefit plans and because HSA trustees' and custodians' primary purpose is not the placement of funds with depository institutions.

Executive Summary

HSAs are tax-advantaged trust or custodial accounts that coordinate with high-deductible health plans to pay or reimburse eligible medical expenses. As of year-end 2018, the number of HSAs exceeded 25 million, and the total amount in HSAs exceeded $53 billion. Although HSAs are individual accounts, they are coordinated with high-deductible health plans and often include contributions by employers.

HSAs must be held by a trustee or custodian that is a bank, a life insurance company, or another organization approved by the U.S. Department of Treasury. As of year-end 2010, 10 of the top 20 HSA providers, as measured by total accounts and total assets, were non-banks. Approval requires compliance with Treasury regulations, including procedures related to net worth, fitness to handle funds, and fiduciary conduct. Whether it is a bank or non-bank, a trustee's or custodian's responsibilities and relationship with HSA holders are the same: the parties have a bona fide trust or custodial relationship, under which the trustee or custodian is obligated to follow the account holder's lawful instructions and Treasury requirements for HSAs.

[1] 84 Fed. Reg. 2366 (Feb. 6, 2019).
[2] 12 C.F.R. § 337.6.

HealthEquity recommends that the FDIC use this opportunity to confirm, formally and unequivocally, that HSAs and Treasury-certified trustees and custodians of HSAs are not subject to the brokered deposit rules, for the following reasons:

- HSAs qualify for the exception for employee benefit plans. Although HSAs are individual accounts and are typically exempt from Title I of ERISA, they are an essential component of consumer-directed health plans. HSAs are coordinated with high-deductible health plans, the majority of which are subject to Title I of ERISA.

- HSA trustees and custodians are agents or nominees of the account holders, and their primary purpose is not the placement of funds with depository institutions. Congress never intended to include a bona fide trustee or custodian as a deposit broker. There is no reasonable basis to interpret the statutory "primary purpose" exception differently for trustees and custodians that are affiliated with banks than for Treasury-approved non-bank trustees and custodians. Such an interpretation would unfairly advantage one cohort of providers over the other.

- HSAs are stable, tax-advantaged trust or custodial accounts that do not implicate the "hot money" concerns that led to the brokered deposit law and regulation. HSAs are heavily regulated to ensure that they are used for a limited purpose—to pay for medical expenses that are not otherwise covered by insurance. It would not be practical to use an HSA as a sham to avoid regulation.

The remainder of this letter is organized as outlined below:

- Section I provides background on HealthEquity and its role as a non-bank custodian of HSAs;

- Section II provides background on HSAs and the benefits they provide to consumers;

- Section III explains why clarification is needed for HSAs;

- Section IV describes the exceptions that should apply for HSAs; and

- Section V explains that HSAs do not raise the "hot money" concerns underlying the brokered deposit rules.

I. About HealthEquity

A. HealthEquity is the largest non-bank custodian of HSAs.

As of year-end 2018, HealthEquity was the largest Treasury-certified non-bank custodian of HSAs, and the second largest of all HSA providers (bank and non-bank), with over 3.9 million

HSAs valued at approximately $7.2 billion.[3] In its capacity as a non-bank custodian of HSAs, HealthEquity establishes interest-bearing accounts for individuals at insured depository institutions and credit unions. HSA holders also may direct HealthEquity to invest funds in an interest-bearing group annuity contract or, if an HSA exceeds a specified balance, in an open-end mutual fund on HealthEquity's platform.[4] Individuals may withdraw funds from their HSAs for qualified medical expenses by check or with a debit card.[5]

B. HealthEquity provides a range of services to HSA holders.

In addition to the placement of HSA funds, HealthEquity provides a range of benefits to HSA holders. Through a cloud-based technology platform, HealthEquity enables individuals to access their HSAs via a desktop or mobile device, make health saving and spending decisions, pay health care bills, compare treatment options and prices, receive personalized benefit and clinical information, earn wellness incentives, grow their savings, and make investment choices.

HealthEquity's platform includes the capability to present individuals with medical bills upon adjudication by a health plan, with details such as the amount paid by insurance, specific nature of the medical service provided, diagnostic code, and the amount the individual owes. Users of the platform can pay these bills from the deposit account established by HealthEquity or with another bank account. Users of the platform also have access to health care consumer specialists, available every hour of every day, via a toll-free telephone number or email. These specialists assist with tasks such as contacting a medical provider to dispute a bill, negotiating a payment schedule, optimizing the use of tax advantaged accounts to reduce medical spending, and selecting from among medical plans offered by an employer or health plan.

HealthEquity's platform illustrates the innovation that non-bank trustees and custodians of HSAs are bringing to the administration of HSAs. The HealthEquity platform is scalable on demand and is configured to seamlessly integrate third-party applications such as price transparency, benefits enrollment, population health, wellness, analytics, health insurance, and investment services.

II. About Health Savings Accounts

A. HSAs are an integral part of health insurance, which is a vital employee benefit.

HSAs are tax advantaged accounts held in trust by a trustee or custodian. They were first authorized by Congress in the Medicare Prescription Drug Improvement and Modernization Act

[3] Devenir Research, *2018 Year-End HSA Market Statistics & Trends*, Feb. 27, 2019.
[4] HealthEquity Trust Company (HETC), a Wyoming-chartered trust company and wholly-owned subsidiary of HealthEquity, serves as custodian for annuities and mutual funds. HealthEquity Advisors, LLC, which also is a wholly-owned subsidiary of HealthEquity, provides investment advice to HETC. HealthEquity Advisors, LLC is registered with the Securities and Exchange Commission as an investment advisor.
[5] HealthEquity's debit card is issued by The Bancorp Bank, a Delaware State chartered, non-member bank.

of 2003.[6] An HSA is owned by the account holder and remains the account holder's property upon a change of employment, health plan, or retirement. HSAs have annual contribution limits, which in 2019 are $3,500 for individuals with self-only coverage and $7,000 for those with family coverage.

HSAs are coordinated with high-deductible health plans, the majority of which are sponsored by employers. To be eligible to contribute to an HSA, an individual must be covered under a high-deductible health care plan and have no additional health coverage (subject to exceptions for certain limited coverage).[7] HSA balances are available to cover expenses incurred before the deductible is reached and to cover other qualified medical expenses, just like other types of employer-provided health insurance. Like reimbursements from traditional health insurance, HSA distributions are not subject to income tax if they are used to pay qualified medical expenses. In addition, as with health insurance premiums, individuals can claim a tax deduction for contributions they make to their HSAs; contributions by an employer are excludable from the individual's income for federal and most state income and employment tax; and interest or earnings accumulate in the account without being subject to tax.

Fundamentally, HSAs are an integral part of a consumer-directed approach to reducing medical expenses.[8] The principle is to reduce premiums through higher deductibles and allow employees and other consumers to contribute their premium savings to HSAs. The higher deductibles incentivize individuals to think like consumers when making medical decisions—for example, considering lower cost alternatives and shopping around for commoditized services like blood tests. When employees need care, they can use the HSAs to pay the deductible; and those who incur fewer expenses can invest their savings for the future. In other words, HSAs are coordinated with high-deductible health plans to give individuals "skin" in their health insurance game.[9] As explained by then Secretary of the Treasury John Snow:

> Health Savings Accounts are useful to consumers because it gives them greater control over their health purchasing decisions and the opportunity to budget for health expenses over many years through rollovers of account balances from year to year—something that makes a lot of sense and will prove to be empowering for consumers.[10]

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[6] Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173.
[7] 26 U.S.C. § 223(c)(1)(A) (definition of "eligible individual").
[8] A. B. Monahan, *The Promise and Peril of Ownership Society Health Care Policy*, 80 Tul. L.Rev. 77 (2006).
[9] Id. *See also* Statement of Senator Frist during Senate consideration of the conference report on the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Cong. Rec., Nov. 24, 2003, S. 15913 ("We will make health savings accounts available to all Americans so that they have greater control over their own health care choices and so they can plan and save, tax free, for future health care needs.").
[10] Press Release, U.S. Department of Treasury, Treasury Issues Comprehensive Health Savings Account Guidance (July 23, 2004), https://www.treasury.gov/press-center/press-releases/Pages/js1812.aspx.

B. HSAs are trusts or custodial accounts under federal and state law, and non-bank trustees and custodians of HSAs are subject to Treasury regulations.

Under federal law, an HSA is a "trust" or "custodial account" that is administrated by a trustee or custodian.[11] The trustee or custodian must be a bank, an insurance company, or another entity that has been approved by the Treasury Department to act in this capacity.[12] Treasury approval requires the applicant to demonstrate its experience and continuing ability to manage the funds in accordance with all regulatory requirements.[13] These obligations require the trustee or custodian to act in accordance with the lawful instructions of account holders, to manage the funds properly, and to maintain the systems to accurately monitor all accounts and beneficial interests consistent with the applicable laws, regulations, and the custodial agreement or trust instrument. In this regard, the obligations of a non-bank trustee or custodian of an HSA are comparable to those of a bank trustee.

To be certified by the Secretary of the Treasury, a non-bank trustee or custodian must demonstrate the following:[14]

- Fiduciary Ability – An ability to act within the accepted rules of fiduciary conduct that are germane to the responsibilities of the trustee or custodian;
- Capacity to Account – Experience and competence with respect to accounting for the interests of a large number of individuals (including calculating and allocating income earned and paying out distributions to payees);
- Fitness to Handle Funds – Experience and competence with respect to other activities normally associated with the handling of retirement funds, including the ability to safeguard securities, collect income, and keep records for tax purposes;
- Adherence to Rules of Fiduciary Conduct – An ability to adhere to applicable rules of fiduciary conduct set out in the Treasury regulations; and

[11] 26 U.S.C. §223(d); *see also* IRS Publication No. 969 (2018) ("A Health Savings Account (HSA) is a tax-exempt trust or custodial account you set up with a qualified HSA trustee to pay or reimburse certain medical expenses you incur.").
[12] 26 U.S.C. § 223(d)(1)(B).
[13] The standards for certification of non-bank custodians of HSAs are the same as the standards applicable to trustees and custodians of individual retirement accounts (IRAs). *See* IRS Notice 2004-2, 2004-2 I.R.B. 269 (Dec. 22, 2003), Q&A-9 (specifying that approval procedures for IRAs under 26 C.F.R. §1.408-2(e) also apply for HSAs); 26 C.F.R. 1.408-2(d). Treasury also has issued procedures for investigations of non-bank custodians of HSAs and other tax-advantaged accounts. *See* Internal Revenue Manual § 4.72.18.
[14] 26 C.F.R. § 1.408-2(e).

- Sufficient Net Worth – A net worth of more than 2% of all assets held in a custodial capacity when acting as a passive custodian, or a net worth of more than 4% of all assets held in custodial capacity when acting as a non-passive custodian.

As of year-end 2018, ***ten of the top 20*** HSA providers, as measured by total accounts and total assets, were non-banks.[15]

C. HSAs are achieving their purpose, changing the model for health insurance.

Since 2003, HSAs have been shown to reduce health care spending, and many employers and employees have successfully lowered their health expenditures by shifting to the consumer-directed HSA model. Studies have found that the consumer-directed model results in a reduction in health care spending.[16] A 2013 analysis by the Employee Benefit Research Institute found substantial reductions in an employer's total health care spending over a four year period, with an aggregate 25% reduction ($527 per person) in the first year alone;[17] and a recent study by the Health Care Cost Institute found both a reduction in spending and improvement in employees' health.[18]

Other studies have come to similar conclusions. A study on health care spending for three years using data from more than 20 large employers and almost five million employees and dependents located throughout the U.S. found reductions in health care cost growth in all three years after employees enrolled in consumer directed health plans; and the study did not detect increases in any component of health care spending.[19] As a result of these studies, it is projected that an aggregate shift to the consumer-directed model with HSAs would reduce health care spending by 12.5% in the United States, which would amount to a savings of more than $400 billion per year.[20]

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[15] Devenir Research, *2018 Year-End HSA Market Statistics & Trends*, Feb. 27, 2019. Other non-banks in the top 20 include Fidelity, BenefitWallet, Payflex, WageWorks, Further, Discovery Benefits, The HSA Authority, and Sterling Administration. Conversely, some banks, such as Wells Fargo, have exited the HSA business. *See* https://www.wellsfargo.com/com/retirement-employee-benefits/hsa/.

[16] *See, e.g.*, Bundorf, K., *Consumer-directed health plans: Do they deliver?*, The Robert Wood Johnson Foundation Research Synthesis Report No. 24 (2012), https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.592.6726&rep=rep1&type=pdf.

[17] McDowell, T., *Note: Mandatory Health Savings Accounts and the Need for Consumer-Drive Health Care*, 16 Geo. J.L. & Pub. Policy 315, 328, 2018 (citing Emp. Benefit Res. Inst., *Health Care Spending After Adopting a Full-Replacement, High-Deductible Health Plan with a Health Savings Account: A Five-Year Study*, July 2013). (The terms "consumer-driven" and "consumer-directed" are used interchangeably.)

[18] *Id.* (citing A. Frost & K. Kennedy, *Consumer-Driven Health Plans: A Cost and Utilization Analysis*, Health Care Cost Inst. 1-2 (2016)).

[19] Amelia M. Haviland, Matthew D. Eisenberg, Ateev Mehrotra, Peter J. Huckfeldt, and Neeraj Sood, *Do "Consumer-Directed" Health Plans Bend the Cost Curve over Time?*, National Bureau of Economic Research, Working Paper 21031.

[20] *Id.*

D. HSAs have expanded significantly in the past decade.

HSAs have expanded significantly in the past several years. In 2005, it is estimated that there were one million individuals with HSAs.[21] As of year-end 2018, the number of HSAs exceeded 25 million and the total amount in HSAs was $53.8 billion.[22] A recent report by the Congressional Research Service highlighted the growing popularity of HSAs:

> Multiple different sources have demonstrated continued increases in HSA-qualified [high-deductible health plan] HDHP enrollment and HSAs since the mid-2000s. With respect to HSA-qualified HDHP enrollees, a report using survey data from insurers has shown a continued increase in enrollment in HSA eligible HDHPs sold by commercial insurers in the individual and the small- and large-group markets from 2005 through 2017. A report using survey data from employers with three or more workers has shown an increase in the percentage of covered employees in HSA-eligible HDHPs between 2006 and 2017.... IRS tax return filer data have shown an increase in the number of tax filers reporting HSA contributions or withdrawals from 2004 to 2012, and HSA account administrator data have shown an increase in the number of accounts from 2011 to 2016.[23]

The benefits of HSAs have been recognized by business reporters, and the FDIC itself. Last August, Thomas Heath, a reporter for the Washington Post, told his readers that "HSAs are financial devices that help health-plan participants save money and become money-conscious health-care shoppers."[24] Similarly, the FDIC maintains a page on its website that states a benefit of an HSA is that "You can save money that can help you avoid a shock to your finances from a sudden large medical bill."[25]

III. Why Clarification is Needed for HSAs

A. Since non-bank custodians of HSAs place the accounts into one or more insured banks, they could fall into the "deposit broker" net, unless an exception applies.

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[21] America's Health Insurance Plans, *Health Savings Accounts and High Deductible Health Plans Grow as Valuable Financial Planning Tools* 3, Apr. 2018.
[22] Devenir Research, *2018 Year-End HSA Market Statistics & Trends*, Feb. 27, 2019.
[23] Ryan J. Russo, Cong. Research Serv., *Health Savings Accounts* 12 (July 31, 2018).
[24] Thomas Heath, *Health Savings Accounts: What You Need to Know*, Washington Post, Aug. 10, 2018.
[25] FDIC Consumer News, *Health Savings Accounts: One Way Some Consumers Can Prepare for Medical Bills*, Summer 2003, https://www.fdic.gov/consumers/consumer/news/cnsum13/health-savings-accounts.html.

A "brokered deposit" is any deposit accepted by an insured bank[26] through a "deposit broker." Section 29 of the Federal Deposit Insurance Act (FDI Act)[27] defines the term "deposit broker" to mean any person "engaged in the business of placing deposits, or facilitating the placement of deposits, of third parties with insured depository institutions."[28] The FDIC has interpreted this definition broadly, picking up "any action taken by third parties to connect insured depository institutions with potential depositors ... even when the third party does not open bank accounts on behalf of depositors or directly place funds into bank accounts."[29] Because non-bank trustees and custodians of HSAs deposit cash from HSAs with insured banks, the trustees and custodians could—incorrectly and unnecessarily—fall into the "deposit broker" net unless the FDIC clarifies that one of the exceptions applies.

The statute and existing FDIC regulations include the following exceptions (among others):[30]

- The trustee of a pension or other employee benefit plan, with respect to funds of the plan;
- A person acting as a plan administrator or an investment adviser in connection with a pension plan or other employee benefit plan provided that that person is performing managerial functions with respect to the plan;
- A trust department of an insured depository institution, if the trust has not been established for the primary purpose of placing funds with insured depository institutions; and
- An agent or nominee whose primary purpose is not the placement of funds with depository institutions.

Existing FDIC guidance does not specify how to apply the exceptions for HSAs. As a result, some banking organizations assume that HSA deposits made by Treasury-certified non-bank trustees or custodians should be treated as brokered deposits, while others (including the majority of HealthEquity's banking partners) have received guidance from their regulators that HSA deposits are core (not brokered).

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[26] For purposes of this letter, the term "bank" includes insured savings associations.
[27] 12 U.S.C. § 1831f.
[28] 12 U.S.C. § 1831f(g). A "deposit broker" also includes any person engaged in the business of placing deposits in insured institutions for the purpose of selling interests in those deposits, and an agent or trustee who establishes a deposit account to fund a pre-arranged loan.
[29] FDIC, *Identifying, Accepting and Reporting Brokers Deposits; Frequently Asked Questions*, July 14, 2016 (hereinafter "FDIC 2016 Q&A Guidance").
[30] 12 U.S.C. § 1831f(g)(2). The FDIC also exempts a bank acting as an intermediary or agent for a Government agency minority or women-owned depository institution program. 12 C.F.R. § 337.6.

B. Why this matters: treatment of HSAs as brokered deposits would create inefficiencies that unnecessarily disadvantage HSA holders.

For the following reasons, treating HSAs as brokered deposits will lead to some banks choosing not to accept deposits from HSAs, even when they are an optimal source of funds:

- *Stigma.* As the FDIC noted in a 2011 Study on Core and Brokered Deposits, many in the banking industry believe that supervisory practices stigmatize brokered deposits, and that bank examiners will criticize those banks that accept brokered deposits regardless of the bank's capital level or the appropriateness of the deposits as part of the bank's asset and liability mix.[31] In response, the FDIC has issued examiner guidance that states there should be no stigma attached to the acceptance by well-capitalized banks of brokered deposits and that the proper use of such deposits should not be discouraged. It is not clear, however, that the examiner guidance has been effective.

- *Negative market perception.* Since the amount of brokered deposits held by a bank is publicly disclosed on the institution's call report, many banking institutions are concerned that the acceptance of these deposits will create a negative market perception.

- *Higher cost to comply with Liquidity Coverage Ratio (LCR).* Introduced in 2014,[32] the LCR requires covered banking organizations and subsidiary banks to maintain sufficient amounts of high-quality liquid assets (HQLA) to withstand a 30-day run on the institution during a period of severe economic stress. To test the sufficiency of the liquidity reserve, the LCR specifies characteristics of a "stress test" with stipulated deposit outflows and other liquidity demands. For all categories of deposits, the outflow rate for brokered funds is considerably higher than for a similar deposit that is not considered to be "brokered." As a result, the cost to comply with LCR will be higher to the extent a bank accepts brokered deposits.

- *Potential for higher deposit insurance assessments.* FDIC depository insurance assessments are based on a formula that takes into account the size of the institution and its risk profile, as determined by considering various metrics. For some institutions, the presence of brokered deposits will result in higher assessments.

Those banks that do accept HSA funds have to consider the potential costs of accepting the deposits when they set the interest rate that they will pay; and fewer banks willing to take deposits can make it more difficult for non-bank trustees and custodians to place deposits and increases their costs.

[31] FDIC, *Study on Core Deposits and Brokered Deposits* 2 (2011).
[32] 79 Fed. Reg. 61440 (Oct. 10, 2014).

Ultimately, these consequences can disadvantage non-bank trustees and custodians—and their customers—relative to trustees and custodians that are affiliated with banks. There is no justification for this result.

IV. HSAs Fit into Deposit Broker Exceptions

Section 29 of the FDI Act contains nine exceptions to the definition of deposit broker, of which at least three are applicable to non-bank trustees and custodians of HSAs.

A. Exceptions for trustees and administrators of employee benefit plans should apply.

As noted above, the brokered deposit rule has two exceptions for trustees and administrators of employee benefit plans. The term "employee benefit plan" is not defined in Section 29 of the FDI Act, nor in the regulations promulgated under that section. Separate rules concerning the amounts covered by deposit insurance refer to the meaning of "employee benefit plan" under Section 3(3) of the Employee Retirement Income Security Act of 1974 (ERISA), but also include plans qualifying under section 401(d) of the Internal Revenue Code (IRC) (Keogh plans for self-employed individuals), which often are not subject to ERISA.[33] In addition, a legal opinion issued by the FDIC in 1986 states that "employee benefit plans" include plans qualifying under IRC §408(d) (IRAs),[34] which are not subject to ERISA.

HSAs are an integral component of employer-sponsored consumer-directed health plans, and therefore should be treated as employee benefit plans for purposes of the brokered deposit rule. To contribute to an HSA, an individual must be covered by a high-deductible health plan,[35] which is a type of employee benefit plan.[36] Employers typically couple the high-deductible health plan with HSAs. Employers or their health insurers typically contract with an HSA provider like HealthEquity to provide HSAs for employees. The employer can then make contributions to employees' HSAs through payroll feeds (salary reduction contributions) and contributions in addition to regular compensation.

Department of Labor guidance provides a roadmap for employers to avoid ERISA compliance obligations with respect to HSAs,[37] and employers typically follow that guidance—resulting in most HSAs being outside the scope of ERISA's requirements. But that does not change

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[33] FDI Act § 11(a), 12 U.S.C. § 1821(a); 12 C.F.R. § 330.14(f).
[34] FDIC-86-38. IRC § 408(d) refers to an "individual retirement plan." That term is defined in IRC § 7701(a)(37) as an individual retirement account under IRC § 408(a) or an individual retirement annuity under IRC § 408(b), each of which is often referred to as an IRA.
[35] 26 U.S.C. § 223(c)(1)(A) (definition of "eligible individual"). *See also* IRS Publication 969.
[36] ERISA § 3(3), 29 U.S.C. § 1002(3) defines "employee benefit plan" as an employee pension benefit plan or an employee welfare benefit plan. An employee welfare benefit plan includes any plan, fund, or program established for the purpose of providing medical, surgical, or hospital care or benefits, or benefits in the event of sickness." 29 U.S.C. § 1002(1).
[37] Dep't of Labor, Field Assist. Bull. 2006-02 (Oct. 27, 2006); Dep't of Labor Field Assist. Bull. 2004-01 (Apr. 7, 2004).

the fundamental fact that the HSA is an integral component of the employer-provided consumer-directed health plan. The high-deductible health plan, which is subject to ERISA, is packaged with the HSA; employers play a role in setting up the HSA; and neither the high-deductible health plan nor the HSA operates in a vacuum. For that reason, HSAs should be treated as employee benefit plans for purposes of the FDIC's brokered deposits rule.

While most HSAs in HealthEquity's portfolio are coordinated with employer-provided high-deductible health plans, some HSAs are coordinated with high-deductible health plans purchased on the individual market. We do not believe those HSAs should be treated differently than HSAs that are associated with employer plans. In the context of brokered deposits, there is no principled basis for treating HSAs that are associated with an employer plan differently than HSAs that are associated with an individual plan. In either case, the primary purpose of the account is to pay or reimburse qualified medical expenses.

B. Primary purpose is not the placement of funds with depository institutions.

As explained above, the primary purpose of HSAs is to cover the cost of medical expenses. The primary purpose of a non-bank trustee or custodian is to administer the HSA in accordance with the requirements for tax-favored status. In this capacity, non-bank trustees and custodians perform a variety of duties that are not related to placing deposits. For example, HealthEquity helps account holders with health savings and spending decisions, and facilitates payment of medical bills by presenting medical bills. The rulemaking should confirm that the placing of deposits with FDIC-insured institutions is ancillary to the trustee's or custodian's primary purpose.

We recognize that the FDIC has interpreted the "primary purpose" exception narrowly, generally limiting the exception to cases where the party placing the deposit intends to promote a goal other than the goal of placing the deposit, and stating that the exception is not available when the party placing the deposit intends to earn fees through the placement of deposits.[38] However, the FDIC's interpretation of primary purpose should not be so narrow as to render the exception meaningless.

As the Supreme Court explained in *FDIC v. Meyer*,[39] the words of a statute—in this case, "primary purpose"—should be given their ordinary or natural meaning. "The word 'primarily' is unambiguous and has a well-recognized and understood meaning. It has been construed in various types of cases of federal and state courts as meaning 'of first importance or principally.'"[40]

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[38] FDIC Q&A Document at 10. *See also* Interp. Ltr. No. 90-21 ("primary purpose" exception is based on agent's or nominee's intent in placing the funds); Interp. Ltr. No. 92-66 (fund administrator was a deposit broker when it offered insured deposits along with a wide range of investment management and advisory services); Adv. Op. 90-21 (May 29, 1990) (primary purpose exception applies to an agent who places funds into a depository institution for a substantial purpose other than to obtain deposit insurance coverage for a customer or to provide the customer with a deposit-placement service); Adv. Op. 94-13 (Mar. 11, 1994) (same); Adv. Op. 94-39 (Aug. 17, 1994) (same).

[39] 510 U.S. 471, 476 (1994).

[40] Municipal Bond Corp. v. Commissioner, 341 F.2d 683 (8th Cir. 1965), aff'd in part and rev'd. in part, 382 F.2d 184 (8th Cir. 1967).

Dictionary definitions are in accord. *Webster's New Int'l Dictionary* defines 'primary' as first in dignity or importance; and *Bouvier's Law Dictionary* defines primarily as:

> That which is first or principal: as, primary evidence, that evidence which is to be admitted in the first instance, as distinguished from secondary evidence, which is allowed only when primary evidence cannot be had.

Indeed, the FDIC has recognized in the past that the statute was not intended to curtail custodians of bona fide trusts from placing deposits. Rather, the "primary purpose" language was included to weed out sham operations. For example, in 1992, the FDIC wrote with respect to a bank trust arrangement:

> The brokered deposit restrictions were not intended to curtail the normal activities of trust departments, but since a blanket exemption for all trust department activities might have led to circumvention of the statute through various trust-type mechanisms, the statute imposed a "primary purpose" test. The primary purpose test serves to distinguish the normal activities of trust departments from arrangements that have the purpose and effect of circumventing the statute.

Similarly, the FDIC stated in 1990 that entities acting in a fiduciary capacity primarily for the financial betterment of some trust, pension plan, or employee benefit plan are "without the primary purpose of placing funds with insured depository institutions."[41]

Interpreting "primary purpose" too narrowly for HSAs could disadvantage non-bank trustees and custodians relative to trustees and custodians that are affiliated with banks. Those who are affiliated with banks could still qualify for an exception "if the trust in question has not been established for the primary purpose of placing funds with insured depository institutions."[42]

There is no principled reason to reach a different result solely because the trustee or custodian is not a bank—particularly where 10 of the top 20 HSA providers are not banks. To the contrary, competition among bank and Treasury-certified non-bank trustees and custodians best serves the public interest, facilitates innovation, and lowers costs for consumers. The "primary purpose" exception should not be interpreted in a way that picks winners and losers.

[41] Adv. Op. No. 90-21 (May 29, 1990).
[42] 12 U.S.C. § 1831f(g)(2)(C). The preamble to the ANPRM recognizes that this exception could be available (84 Fed. Reg. at 2372).

V. HSAs Do Not Implicate the Concerns Underlying Regulation of Brokered Deposits

As summarized in the brief history below, brokered deposit regulation grew out of concerns about "hot money." HSAs do not implicate those concerns.

A. The phase out of interest rate controls and the increase in deposit insurance limits stimulated the development of the brokered deposit industry in the early 1980s.

From 1966 until 1980, federal law regulated the maximum amount of interest that could be paid by insured banks and savings associations on time and savings deposits.[43] These limitations allowed banking institutions to obtain relatively inexpensive deposits to be used for making mortgage and other loans. However, beginning in the 1970s, the United States economy became buffeted by ever higher levels of inflation.[44] In response, the Federal Reserve Board began to sharply increase rates in order to bring inflation under control. Soon, banks and savings associations found themselves competing with securities firms offering deposit-like securities products, such as money market mutual funds, with much higher returns than available from regulated bank deposits.[45] The result was a significant tightening of the supply of funds available for bank lending and in particular mortgage lending. [46] This phenomenon is called "disintermediation."

In order to deal with this problem, Congress passed the Depository Institutions Deregulation and Monetary Control Act, signed into law by President Carter on March 31, 1980.[47] This law began the orderly phase out of mandatory deposit interest rate caps and increased the FDIC deposit insurance limit from $40,000 to $100,000.

With the increased limit on deposit insurance and the relaxation of deposit interest rate caps, an opportunity developed for deposit brokers to earn fees by placing customer funds into insured banks offering the highest returns. Some deposit brokers also developed programs for pooling funds in order to purchase a large denomination of high yielding bank certificates of deposit, which provided "pass through" FDIC insurance to each beneficial owner. These programs earned fees for the money broker and were attractive to consumers by providing them with both a market rate of return and FDIC insurance protection.[48]

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[43] Pub. L. No. 89-597 (1966) authorized the Federal Reserve Board to set interest rate caps on time and savings deposits. These caps were implemented through Regulation Q, which has since been repealed.
[44] *See* R. Laughlin, *Causes of the Savings and Loan Debacle*, 59 Fordham L. Rev. 301 (1991).
[45] E. Walker, *Disintermediation and its Effects on the Stability of Savings Capital and Financial Institutions*, Studies in Economics and Finance, Vol. 3 Issue: 1, pp.63-75 (1979).
[46] Sen. Comm. Rep. No. 96-368 (accompanying Pub. L. No. 96-221).
[47] Pub. L. No. 96-221 (1980).
[48] Paul Clark, *Just Passing Through: A History and Critical Analysis on FDIC Insurance of Deposits Held by Brokers and other Custodians*, Review of Banking and Financial Law 99, 102 (2012-13).

B. Failures of savings and loans in the late 1980s led to passage of the brokered deposit statute.

By 1983, the FDIC (and its sister agency at that time, the Federal Home Loan Bank Board, which insured deposits in savings associations) became concerned that poorly managed or otherwise troubled depository institutions were using brokered deposits as an easy source for large amounts of cash, and that these deposits were helping some of these institutions attempt to "grow themselves" out of trouble.[49] In 1985, then-FDIC Chairman Isaac summarized the problem in testimony before Congress:[50]

> Money brokers scour the country in search of hot money, seeking the highest available return. The funds are packaged in fully insured blocks and then sold to the highest bidder, which all too often in a marginal, high-risk institution…. It is a simple fact that troubled banks and thrifts use brokered funds more frequently and more extensively than well rated institutions. These institutions tend to pay the highest rates, and brokered funds flow to the highest bidders.

The term "hot money" means short-term funds that are placed to obtain a high rate of return, and that may quickly be withdrawn if the bank reduces its interest rate, or if another bank offers an even higher rate.[51] However, the agencies' concerns were directed primarily at the acceptance of brokered deposits by troubled institutions, and not by the use of brokered deposits by healthy depositories.[52]

Concerns about "hot money" relate to a number of issues. Since hot money is not a long-term deposit, the sudden withdrawal of these funds could result in liquidity shortages. To avoid this, banking organizations may be motivated to enter into bidding wars thereby forcing the cost of funds up for many institutions. Hot money must be invested by the banking institution to earn the returns necessary to support the interest paid on these deposits. Thus, the need to offer higher rates to attract brokered deposits can result in banks having to make riskier investments in order to fund the higher interest rates paid.[53]

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[49] *See* explanatory material at 48 Fed. Reg. 50339 (1983).
[50] Testimony of FDIC Chairman William Isaac, Hearings on Impact of Brokered Deposits on Banks and Thrifts, Hearing Before the Subcomm. on Oversight and Investigations, House Comm. on Banking, Finance and Urban Affairs, 99th Cong. 1st Sess. (1985).
[51] "Hot Money" refers to short-term deposits that are placed to obtain the highest possible yield and are therefore highly volatile. Statement of Edwin Gray, Chairman of the Federal Home Loan Bank Board, Hearings Dep't of Housing and Urban Development and Independent Agencies Appropriations for 1985, House Comm. On Appropriations, 98th Cong. 2d Sess. at page 53 (1984).
[52] *See* H. Rep. No. 99-676, Federal Regulation of Brokered Deposits: A Follow-up Report, 99th Cong. 2d Sess. (1986).
[53] These issues are discussed at 49 Fed. Reg. 13,003, 13,006 (1984).

Following massive failures in the savings and loan industry in the mid- to late-1980s, the role of brokered deposits again became the focus of regulatory and Congressional interest, and eventually led to the passage of Section 29 of the FDI Act in 1989 as part of the Financial Institution Reform, Recovery and Enforcement Act.[54] The need for this legislative amendment was again based on the use of brokered deposits, obtained through the payment of above market rates, to support risky and speculative investments by weak and insolvent institutions.[55]

It is not clear if these concerns about brokered deposits are still relevant. As FDIC Chairman William Seidman explained in Congressional testimony in 2001:[56]

> The concept of brokered deposits as developed back there in those days has been substantially outmoded by the Internet. Now the whole country is, in effect, a broker and deposits are raised nationally on the Internet. So, the limits on what can be raised, and the work of the broker is really not much used anymore…

C. The definition of "deposit broker" in Section 29 is based upon a 1984 regulation that was not intended to cover bona fide trust or custodial accounts, such as HSAs.

The scope of Section 29 is bound by its definition of a "deposit broker." The legislative history of Section 29 reveals that Congress did not debate the meaning of this term, but instead adopted, *almost verbatim*, the definition of a "deposit broker" that was used by the FDIC and the Federal Home Loan Bank Board in a regulation issued in 1984.[57] The regulatory explanation of what was intended by that definition should guide the FDIC's interpretations of the term today.

When the regulation was first proposed in the form of a Notice of Proposed Rulemaking (NPR) in January 1984, it did not contain the list of exceptions found in the final regulation and the statute.[58] As explained in the preamble, the final rule included the list of exemptions, in response to public comments expressing concerns that the rule as proposed would impact trusts, pensions, and other employee benefit programs. The FDIC made clear that it did "not intend to disturb traditional deposit relationships,"[59] but instead was seeking to cover only trusts that are established to circumvent the rule.

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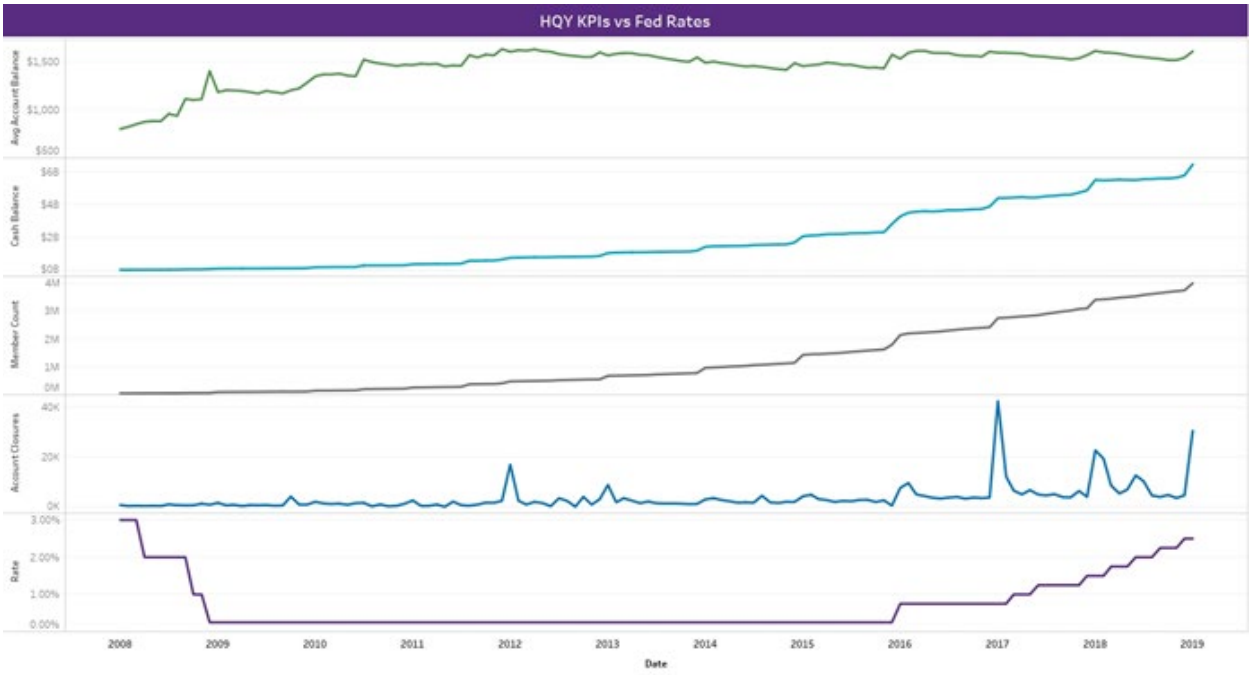
[54] Pub. L. No. 101-73.
[55] Sen. Rep. No. 101-19, 101st Cong. 1st Sess. 40 (1989).
[56] Protecting Retirement Savings, FDIC Coverage for Retirement Accounts, Hearing Before the Subcomm. on Financial Institutions of the Sen. Comm. On Banking, Housing and Urban Affairs, 107th Cong. 1st Sess. (2001).
[57] The brokered deposit amendments to Senate Bill 774 were sponsored by Senator Murkowski. 135 Cong. Rec. S 4266 (Apr. 19, 1989). Sen. Murkowski had proposed similar legislation to restrict brokered deposits prior to sponsoring the amendment to Senate Bill 774. While introducing these earlier bills, Mr. Murkowski referenced the 1984 regulations and stated that the bills were intended to restore the provisions of the 1984 FDIC and Federal Home Loan Bank Board regulation that was subsequently overruled in federal court.
[58] The NPR was published at 49 Fed. Reg. 2787 (1984).
[59] 49 Fed. Reg. at 13,038-39 (1984).

The exceptions picked up employee benefit plans that existed at the time, plus trustees of IRA and Keogh accounts that were not subject to ERISA. If HSAs had existed at that time, it is hard to imagine that they would not have been included on the exception list.

D. HSAs are not "hot money" deposits.

HSA deposits are stable accounts, not "hot money" deposits. The graph below illustrates the stability of the HSAs administered by HealthEquity between January 1, 2008 and January 1, 2019. The graph shows that the average account balance (the green line), the aggregate cash balance (the turquoise line), and the total member accounts (the grey line) have all increased throughout the period. Account closures (the blue line) have followed a distinct pattern of high disclosures in January, followed by a small steady increase as total member accounts increased. Moreover, this continuous and steady growth in the accounts has occurred even as the interest rates have fluctuated throughout the past decade, as shown by the fed funds rate (the purple line).



The stability of these accounts also has been acknowledged by banks that accept HSAs. The chairman of the American Bankers Association's HSA Council and Senior Vice President of PNC's treasury management group, Jim Gandolfo, has stated that: "In general terms, these are very favorable deposits looked upon as very sticky to the bank."[60]

[60] ABA Banking Journal, Podcast: Opportunities for Banks in the Health Savings Account Market, Apr. 12, 2018, https://bankingjournal.aba.com/2018/04/podcast-opportunities-for-banks-in-the-health-savings-account-market/.

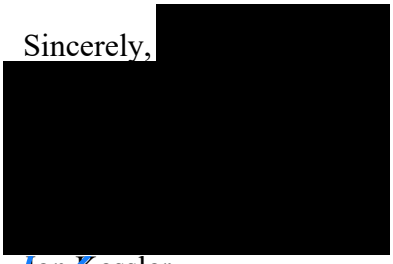
Conclusion

HSAs are an integral component of modern consumer directed health plans. They do not implicate the concerns underlying the brokered deposit rule. Accordingly, the FDIC should clarify that HSAs and non-bank trustees and custodians are not subject to the brokered deposit rule. The rules should not make arbitrary distinctions based on any of the following characteristics that have no impact on the underlying policy:

- Whether or not an employer contributes to the HSA;
- Whether the HSA is coordinated with an employer-sponsored high-deductible health plan or a plan purchased on the individual market; or
- Whether the trustee or custodian happens to be affiliated with a bank.

Again, HealthEquity appreciates the opportunity to provide comments in response to the ANPR. Please let us know if additional information or clarification would be helpful.

Sincerely,



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