



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

Subject: Comment Letter – FDIC Advanced Notice of Proposed Rulemaking “Unsafe and Unsound Banking Practices: Brokered Deposits and Interest Rate Restrictions”

Dear Mr. Feldman,

Avidia Bank (Avidia) appreciates the opportunity to comment on the Advanced Notice of Proposed Rulemaking (ANPR) published in the Federal Register on February 6, 2019, “Unsafe and Unsound Banking Practices: Brokered Deposits and Interest Rate Restrictions.”¹ Avidia administers and offers Health Savings Accounts (HSAs) to a large number of individuals whose employers offer High Deductible Health Care Plans (HDHCPs). Avidia and a number of similarly situated banks act as trustee and/or custodian (Trustee/Custodian Banks), providing traditional banking services including deposit and card base activity, as well as tax reporting. Avidia has an intermediary relationship with a technology company that provides processing services to Third-Party Administrators (TPAs) through which Avidia receives HSA deposits. Due to a lack of clarity under the current brokered deposit regulatory framework as to whether HSAs—including, but not limited to, those established by employees covered by HDHCPs—should be treated as employee benefit plans and whether the intermediaries that funnel HSA deposits to various depository banks—ultimately, on behalf of the employees—are intended to be covered by the exclusion in Section 29(g)(2)(E) of the Federal Deposit Insurance Act,² and in an abundance of caution, Avidia and other similarly situated banks have classified such HSAs placed by third party intermediaries under these circumstances as brokered deposits. The classification of these HSA accounts under these circumstances as brokered deposits when they present none of the risks of traditional brokered deposits materially disadvantages Avidia and similarly situated banks and serves no apparent public policy, as described below. We comment on the ANPR in order to urge the FDIC to clarify, for the reasons and in the manner described below, that HSAs received under these circumstances should not be treated as brokered deposits under Section 337.6 of the FDIC’s rules.³

The FDIC Should Expand the Section 337.6(a)(5)(ii)(E) Exclusion to Expressly Cover HSAs

TPAs and their agents involved in facilitating the placement of HSA deposits with a Trustee/Custodian Bank in the circumstances described in this comment letter are acting as plan administrators within the meaning of the Section 29(g)(2)(E) exclusion, which provides that the term “deposit broker” does not

¹ 84 Fed. Reg. 2,366 (Feb. 6, 2019).

² 12 U.S.C. § 1831f(g)(2)(E).

³ 12 C.F.R. § 337.6.

include “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.”⁴ This exclusion is implemented by Section 337.6(a)(5)(ii)(E) of the FDIC’s rules.⁵ Although that exclusion does not expressly cover HSAs, HSAs are tax-advantaged employee benefits established under the Internal Revenue Code.⁶

It is Avidia’s view that HSAs including, but not limited to, those established by employees covered by HDHCPs should be expressly considered part of an “employee benefit plan” arrangement within the meaning of the Section 337.6(a)(5)(ii)(E) exclusion. HDHCPs—which are clearly employee benefit plans—exist for the purpose of reducing the cost of employees’ health insurance. At the same time, individuals often bear higher out-of-pocket costs in connection with HDHCPs. HSAs, created by Congress to provide tax advantages to individuals who are saving funds for health care expenses, are often an associated feature of HDHCPs. As a result, it is fair to link HSAs established in these and similar circumstances to HDHCPs and to consider HSAs as an integral part of an employee benefit plan arrangement and covered by the Section 337.6(a)(5)(ii)(E) exclusion, especially when all of the functions the TPA performs for the employer and the employer’s employees are taken into account. These functions, carried out to varying degrees by employers and their TPAs, include, for example, identifying and performing due diligence on depository banks, educating employees about HSAs, assisting with account opening, facilitating direct deposit contributions to HSAs from payroll, and addressing employee questions and concerns. The FDIC has acknowledged that HSAs are tax-advantaged “non-retirement savings plans” similar in certain respects to other employee benefit plans.⁷

HSA deposits are often placed with Trustee/Custodian Banks through a third-party technology services provider under an information technology services agreement for outsourced technology and infrastructure that the TPA needs in order to carry out its functions for employers. The third-party technology services provider merely functions as an agent of the TPA, and together they administer the HSAs as employee benefit plans. Such third-party technology services providers are agents of the TPAs and only provide the technology and related infrastructure that the TPA could have developed on its own if it had chosen to do so. Such third-party technology services providers act under the direction and control of the TPAs they serve.

The intermediary technology services provider’s primary purpose is to provide technology and related services. This is evidenced through the information technology services agreement that Trustee/Custodian Banks execute with such an intermediary. These technology companies are not primarily facilitators of deposit relationships; rather, their primary purpose is to offer the enabling technology while bundling a number of services incidental or ancillary to their function as a technology provider. As a result, it is Avidia’s view that these technology services providers should be treated as extensions or agents of the TPAs themselves, and that the TPAs and technology services providers performing managerial functions for the placement and servicing of such HSA deposits fit within the exclusion from the definition of a “deposit broker” for employee benefit plan administrators in Section 337.6(a)(5)(ii)(E).

⁴ 12 U.S.C. § 1831f(g)(2)(E).

⁵ 12 C.F.R. § 337.6(a)(5)(ii)(E).

⁶ See 26 U.S.C. § 223.

⁷ 84 Fed. Reg. 2366, 2372 (February 6, 2019).

Avidia's Experience Indicates that HSAs Present None of the Risks of Traditional Brokered Deposits

As indicated above, Trustee/Custodian Banks such as Avidia derive HSA deposits through intermediary relationships with TPAs that service employers, other employee benefit plan administrators, and insurance carriers that seek to provide individuals with HDHCPs and associated HSA deposit accounts as part of their employee benefit plan arrangements. Each HSA account derived from such intermediary relationships results in a *direct and continuing* deposit relationship between individual account holders and the Trustee/Custodian Bank. The individual account holder has discretion to open or close his or her HSA account (as opposed to a third party having such power) and can choose from numerous alternative market participants offering HSA accounts when making that decision. The account itself is akin to a limited purpose account with respect to the limitations placed on deposits made to the account and the qualifications for expenditures to be used for eligible medical purposes. Therefore, the intermediaries (i.e., TPAs and their agents) involved in facilitating the establishment of individual HSAs with a Trustee/Custodian Bank do not have the authority to control the HSAs in any way that is comparable to the control traditional deposit brokers are able to exercise that allows, for example, a traditional deposit broker to quickly withdraw brokered deposits in large quantities.⁸

Unlike HSA deposits, traditional or typical brokered tend to be volatile and are comparatively high-cost.⁹ Avidia's experience with HSA deposit accounts is illustrative of the ways in which HSAs are distinguishable from traditional brokered deposits in terms of the characteristics that concern policymakers and regulators regarding safety and soundness issues related to brokered deposits. HSAs have a proven history as a stable source of funding. Since the inception of Avidia's HSA deposit program, the interest rates for HSA accounts historically have remained stable while general market rates have increased. As shown on the enclosed charts, overall HSA balances also have remained stable and have not experienced significant outflows throughout the program's existence. Avidia's experience evidences that HSAs are not rate sensitive deposit accounts, an attribute typically associated with brokered deposits.

HSA accounts are transactional in nature, are used for limited health care related transactions, and act more like traditional demand deposit accounts. As shown on the enclosed charts, Avidia's average HSA deposits have remained within a stable range even as our portfolio has grown, monthly activity is stable after the initial transfers in are received at the beginning of the year (the only seasonality that is experienced), and transactions within the accounts are generally stable throughout the year.

As a result of our empirical information supporting the stability and low cost of HSA deposits, it is our view that the FDIC should expressly include HSA deposits administered by a TPA within the Section 337.6(a)(5)(ii)(E) exclusion in order to clarify that these types of deposits are fundamentally different from traditional or typical brokered deposits, do not behave the same way, and as a result do not present any of the same risks. We also suggest that the Frequently Asked Questions (FAQs) regarding identifying, accepting and reporting brokered deposits issued on June 30, 2016 by the FDIC¹⁰ be revised to specifically address HSAs held by Trustee/Custodian Banks, whether placed directly by a TPA, by an

⁸ See *Study on Core Deposits and Brokered Deposits*, FDIC, July 8, 2011, pages 15 and 49-52 (<https://www.fdic.gov/regulations/reform/coredeposit-study.pdf>).

⁹ See *id.* at pages 11, 15, 32 and 52.

¹⁰ See FDIC Financial Institution Letter FIL-42-2016 (June 30, 2016).

agent on behalf of a TPA or by another employee benefit plan administrator, to clarify that these types of HSAs are not considered brokered deposits under the rule.

The nature and variety of employee benefits has evolved remarkably since Section 29(g)(2)(E) of the FDI Act was enacted and implemented by the FDIC, and the FDIC's rules should reflect those changes in a manner consistent with sound public policy. The rules should also be flexible so as to accommodate future developments in tax-advantaged employee benefits and related financial products—particularly tax-advantaged individual non-retirement savings plans established under the Internal Revenue Code that supplement or replace large, employer-sponsor pension and benefit plans. Avidia recommends that the FDIC amend Section 337.6(a)(5)(ii)(E) of its rules clarify that HSAs are expressly covered by that exclusion.

We thank you for the opportunity to provide comments.

Sincerely,

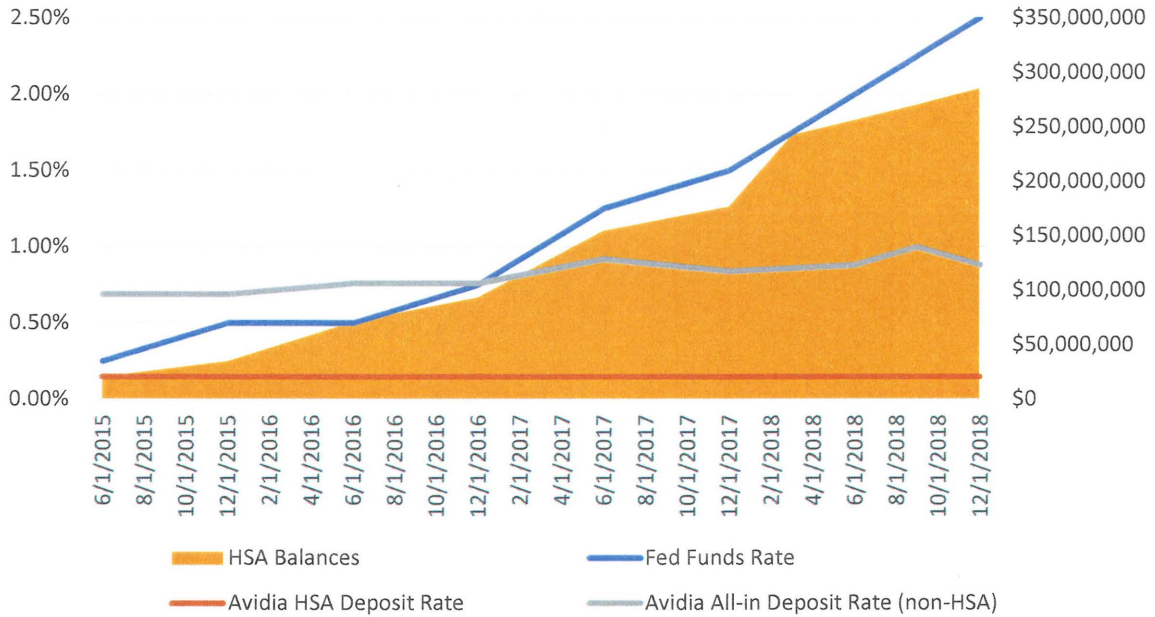


Mark O'Connell
President and CEO
Avidia Bank

Enclosures

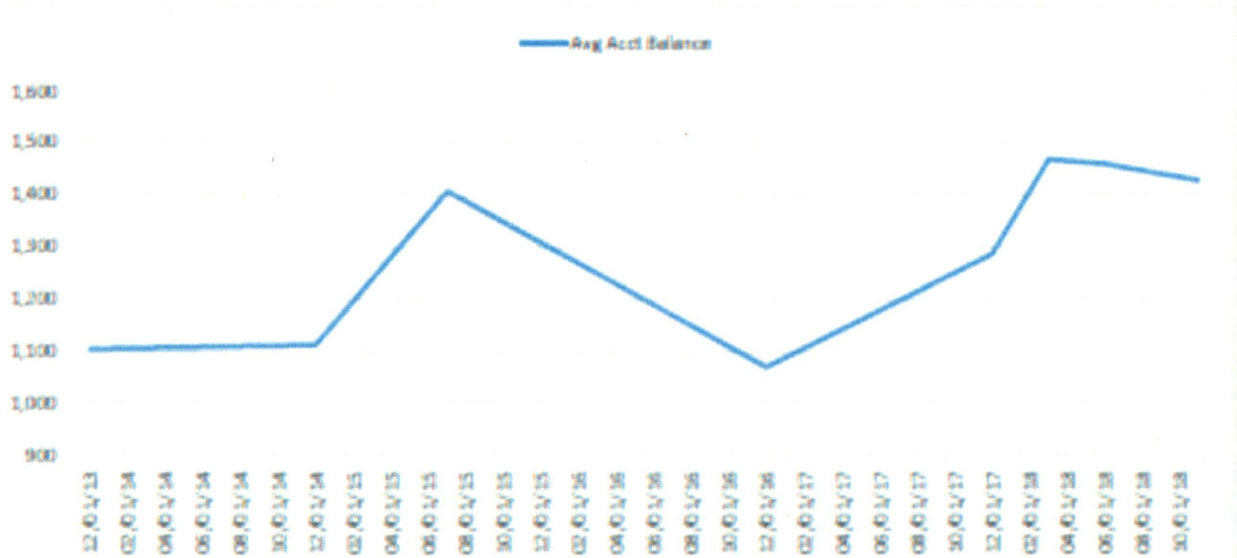
APPENDIX: Empirical HSA data

Avidia Bank HSA Deposits and Rates



- HSA pricing has remained well below general market interest rates and our non-HSA cost of funds, while balances have continued to grow. HSA's have not shown to be rate sensitive, one of the traditional characteristics of a brokered deposit, operating like a transactional account.

HSA Average Account Balances



- Average account balances are generally within an \$1100-\$1500 range since we began offering HSA accounts, showing stability across a broad base of individual account holders at the bank.