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April 10, 2020

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Robert E. Feldman
Executive Secretary,
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, D.C. 20429

Re: [Brokered Deposits RIN 3064-AE94]

Dear Mr. Feldman:

Healthcare Bank (HCB), a division of Bell Bank, is pleased to submit these comments on the revised Advance Notice of Proposed Rulemaking (ANPR) on Unsafe and Unsound Banking Practices: Brokered Deposits and Interest Rate Restrictions.

The revised ANPR was published by the Federal Deposit Insurance Corporation (FDIC) on February 10, 2020.

1. The FDIC Must Consider the Impact of the APNR on the need for Affordable and Accessible Health Savings Accounts ("HSAs") during the COVID-19 Pandemic

The proposed rule imposes significant administrative burdens on HSA custodians that will translate to reduced availability and higher fees for HSAs. In light of the COVID-19 pandemic, the potential for future waves of infections, and the economic downturn necessitated by Federal, State, and local quarantine, isolation and "stay at home" orders, a rule that decreases competitiveness in the HSA market and increases costs to consumers must be weighed carefully against evidence-based need for regulation.

As we noted in our April 26, 2019 comments to the ANPR published by the Federal Deposit Insurance Corporation (FDIC) on February 6, 2019, the continued growth of HSAs, and the promotion of individual savings for health care expenses, is critical to ensure the financial stability, health and well-being of employees. Over 28 million Americans use HSAs to pay medical bills for themselves and their dependents.[1] Due to COVID-19, The St. Louis Federal Reserve predicts potential job losses of over 47m for 2020, translating to a 32.1% unemployment rate.[2] Unlike many other employee benefits, HSAs are portable, and unemployed Americans will still be permitted to access their accounts. But employees that lose their jobs assume

[11] Devenir 2019 Year-End Research Report dated March 3, 2020, accessible at: https://www.devenir.com/research/2019-year-end-devenir-hsa-research-report/.

[2] Cox, Jeff. Coronavirus job losses could total 47 million, unemployment rate may hit 32%, Fed estimates. CNBC (April 9, 2020). *Accessible at*: https://www.cnbc.com/2020/03/30/coronavirus-job-losses-could-total-47-million-unemployment-rate-of-32percent-fed-says.html

responsibility for paying monthly administrative fees for HSAs, which are otherwise typically paid by employers. Imposing burdensome administrative requirements on HSA custodians will result in an increase in administrative fees, reducing the amount of funds available to individuals for the payment of medical expenses.

The FDIC acknowledges that the primary purpose of an agent's or nominee's business relationship with its customers will not be considered to be the placement of funds as a deposit broker if the agent or nominee places depositors' funds into transactional accounts for the purpose of enabling payments. But the APNR would impose a complex application process on HSA custodians that wish take advantage of this exemption.

We begin by noting that Congress has already designated HSAs to be transaction accounts. Section 223(d) of the Internal Revenue Code provides as follows:

> The term "health savings account" means 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...*

Emphasis added. This should be where the inquiry ends as a matter of law.

The FDIC knows or should know that nearly all HSAs pay interest to depositors.[3] Application processes described in the APNR that are dependent upon not paying interest to consumers will at best, not be available to HSA custodians, and at worst, create an incentive for eliminating interest payments to consumers, reducing the amount available to pay medical expenses. Application processes described in the APNR that are dependent upon placing less that 25 percent of total customer assets under management with banks will also be unavailable to HSA custodian that work with third party administrators (TPAs). TPAs that administer HSAs specialize in employer *welfare* benefits, rather than pension or retirement plans. Their services include the administration of health flexible spending accounts, dependent care accounts, health reimbursement arrangements and HSAs. Of these product lines, only HSAs result in the placement of customer assets at insured depository institutions – other welfare benefits are almost exclusively unfunded. Few if any TPAs in this industry will qualify for application processes dependent upon placing less that 25 percent of total customer assets under management with banks.

This leaves TPAs and HSA custodians with the "long form" application process described in the APRN. The extensive list of requirements will be burdensome and expensive for TPAs to complete, and TPAs are not likely to voluntarily submit to ongoing reporting requirements. There is simply no incentive for TPAs to take these actions for the benefit of HSA custodians. While the FDIC contemplates that HSA custodians could complete these applications for TPAs, the requirements include submission of proprietary contracts with customers and with other depository institutions in which the TPA is placing deposits. These contracts are subject to

[3] As we indicated in our comments to the April 26, 2019 APNR, there is little if any price sensitivity of demand based on interest rates; employers select HSA custodians based on monthly administration fees and service. Interest rates on HSAs at HCB and nationwide typically reflect rates paid on ordinary demand deposits in the same market area. These small, stable accounts are ideal for reducing risk and volatility in any bank's balance sheet.

confidentiality requirements and TPAs will not be willing, and will be prohibited from, sharing them with depository institutions that wish to file applications on their behalf.

In short, the proposed application process depends entirely on disinterested third parties voluntarily submitting lengthy and complex applications with the FDIC, and submitting to ongoing reporting to the FDIC, or sharing proprietary and confidential information with HSA custodians so they may submit this information on their behalf. This is not a practical or feasible process for determining whether HSAs are transaction accounts for purposes of the primary purpose exemption. Nor is it necessary where Congress has designated HSAs as transaction accounts under Section 223 of the Code. Even if it were possible to comply, it would require reimbursement of related expenses to TPAs. Failure to apply for the exemption appears to result in default characterization of HSAs as brokered deposits, which could result in higher FDIC insurance premiums. The added costs will likely be passed on to consumers, and this economy, that will include millions of unemployed workers who must pay their own monthly maintenance fees. It will also lead some banks to exit the HSA market, and keep others from entering the market, reducing competition to the detriment individual HSA accountholders.

We ask the FDIC to concede the status of HSAs as transaction accounts consistent with the intent of Congress. In the alterative, we ask that the defer rulemaking with respect to HSAs, and set aside a portion of its regulation of brokered accounts for HSAs as "reserved."

2. Additional Study is Required

The FDIC acknowledges in the ANPR that brokered CDs are often used by bank customers searching for relatively high yields on their insured deposits, and as such these deposits may be less stable and more subject to deposit interest rate competition. It also acknowledges that certain deposits may be more based on a business relationship than on interest rate competition. But the FDIC disregards these distinctions for the following reason:

> Given limitations on available data, however, historical studies have not been able to differentiate the experience of banks based on the different types of deposits accepted.

Though no citation is provided to support this statement, it appears from the context of the discussion that the FDIC is referring to its Study on Core Deposits and Brokered Deposits, Submitted to Congress pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act, FDIC, July 8, 2011.[4] In that study, the FDIC evaluated,

> high rate deposits, reciprocal deposits, deposits swept from an affiliated-broker dealer, referrals from affiliates (which, in some limited circumstances, may include referrals from agents of the bank or affiliate), and passive (non-brokered) listing service deposits based on the following characteristics: interest rate, customer relationship, ease of access, deposit insurance status and time to maturity.[5]

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[4] *Accessible at:* https://www.fdic.gov/regulations/reform/coredeposit-study.pdf. This study is cited several times in the APNR.

[5] *Id* at page 4, FN 5.

There is not a single reference to HSAs within the 120-page study cited above. Moreover, the FDIC began collecting data on that study during the second quarter of 2009, "well after a severe real estate downturn and banking crisis had already begun." [6] Accordingly, "[t]he data available to us about reciprocal deposits thus do not include the pre-crisis period where the bank behaviors associated with the most significant policy concerns about brokered deposit usage would have been most likely to have been observed."[7]

We do not believe that the *absence* of data should form the basis for decision making when issuing a final rule that has a negative effect on HSAs. HSAs are ubiquitous throughout the economy of the United States, and there are not substantial limitations on data on these products. In its 2019 Year-End Research Report dated March 3, 2020, Devenir reports as follows:

> Health savings account growth accelerated in 2019, jumping to almost $66 billion in assets held in over 28 million accounts, a year-over-year increase of 23% for assets and 13% for health savings accounts for the period ended December 31st, 2019.[8]

Despite the significance of these accounts by number, total assets, and their broad utilization throughout the United States to help individuals pay for medical expenses, the FDIC has proposed regulations that would impose significant administrative burdens on HSA custodians, reduce competition, and increase fees. While the FDIC could not have foreseen the COVID-19 pandemic at the time it issued its APNR, it must weigh the cost of limiting access to HSAs to individuals against reducing a risk for which it has no data and has conducted no studies.

If it is not willing to accept Congress' determination that HSAs are transaction accounts, we believe the FDIC should conduct further research and study on this type of deposit and its potential for creating financial risk within the banking system. Until such time as data is available, it should mark a portion of its regulations as they pertain to HSAs as "reserved,"

3. The APNR is not Responsive to Concerns Raised by HSA Custodians

The APNR duly notes that commenters on its December 18, 2018 ANPR made the following arguments:

- Third party administrators (or HSA custodians) that assist in placing HSA deposits at insured depository institutions fit within the statutory exception for plan administrators for employee benefit plans, and/or should meet the "primary purpose exemption."
- HSAs placed at insured depository institutions by third parties do not represent "hot money" but rather are a stable source of funding.
- Third party administrators do not have the same authority to control the HSAs in a manner comparable to the control of traditional deposit brokers.
- Public policy supports HSAs to offset high employee healthcare costs, and to increase competition, innovation and reduced cost in the banking industry.

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[6] Id. at 44.
[7] Id.
[8] *Accessible here:* https://www.devenir.com/research/2019-year-end-devenir-hsa-research-report/

The final bullet point above is especially urgent and relevant today due to the COVID-19 pandemic. While these arguments were summarized, there was no discussion, analysis or response by the FDIC in the February 10, 2020 APNR.

In *AARP v. United States Equal Employment Opportunity Commission*, No. 16-2113 (D.D.C. Aug. 22, 2017), the U.S. District Court for the District of Columbia vacated the EEOC's rule on wellness programs, finding them to be "neither reasonable nor supported by the administrative record." Under the rule, the EEOC had established limits on incentives and penalties that would be allowed under wellness programs, but failed to provide a rational for how it reached its decision. As noted in its opinion,

> While the Court acknowledges that some arbitrary line drawing may be necessary in determining where to set the incentive level, the agency must still point to some evidence in the record that reasonably supports where it chose to draw the line, and it must also respond to "substantial criticisms" of that choice.
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> Neither the final rules nor the administrative record contains any concrete data, studies, or analysis that would support any particular incentive level as the threshold past which an incentive becomes involuntary in violation of the ADA and GINA.[9]

Because the application process does not provide meaningful relief for HSA custodians for the reasons described in Section 1 above, the effect of the APNR is to characterize HSA deposits as brokered deposits without analysis or review of substantial criticism. The result may be increased FDIC insurance rates on banks that make these products available, or increased administrative costs in efforts to obtain an exemption through applications. By making these products more expensive for banks to offer, the FDIC will reduce their availability and increase their cost to Americans who rely on them to pay medical expenses. We implore the FDIC to take a fresh look at concerns raised by HSA custodians, and also to reassess the need for accessible, affordable HSAs at this time.

4. The Proposed APNR Overreaches

Congress, through the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) of 1989 (FIRREA), intended to restrict banks with *weakened capital positions* from holding significant quantities of risky deposits, which were bundled by intermediaries bringing together investors and investment products. In its proposed APNR, the FDIC casts a much broader net, requiring banks to demonstrate proof that insured deposits involving a direct, continuing relationship between a customer and a healthy insured depository institution meet statutory exemptions that plainly apply. The application process in the APNR is a blunt instrument that

[9] AARP v. EEOC, Mem. Op. at 28, 33. *And see Bluewater Network v. EPA*, 370 F.3d 1, 11 (D.C. Cir. 2004) (quoting Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43) (The court is "principally concerned with ensuring that [the agency] has 'examined the relevant data and articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice made,' that the [a]gency's 'decision was based on a consideration of the relevant factors,' and that the [a]gency has made no 'clear error of judgment.'").

hits different segments of the banking industry with unequal force, and appears to go well beyond Congress' intent in enacting FIRREA. In its recent decision vacating the Department of Labor's fiduciary rule, the Fifth Circuit Court of Appeals recognized that "Congress does not hide elephants in mouseholes."[10] We ask the FDIC to fine-tune its guidance to fit market realities based on concrete data, studies, and analysis.

5. Conclusion

Based on our understanding of the proposed ANPR and its application process, the effect will be to deprive HSA custodians of an exemption from the brokered deposit rules to which they are otherwise entitled. But the impact of such a rule goes beyond the financial services industry and affects ordinary Americans who use HSAs to pay medical bills. HSAs should be promoted, protected, and offered in a competitive environment to keep fees as low as possible in order to maximize the purchasing power of consumers. We see no evidence supporting characterization of these stable, relationship-based accounts as brokered deposits, and we ask the FDIC to exempt them from the rule as prima facie transaction accounts. Barring that, we believe the agency should include a placeholder for HSAs in the rules to permit it to conduct further study on the need for regulation of HSAs as brokered accounts, and to balance that research with the benefit of these accounts for consumers.

[10] *Chamber of Commerce, et. al. v. Acosta*, No. 17-10238 (5th Cir. March 15, 2018), quoting *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). *And See Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) (hereinafter, "UARG") ("When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism.")