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May 15, 2020

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

Re: Unsafe and Unsound Banking Practices: Brokered Deposits Restrictions (RIN 3064–AE94)

Dear Mr. Feldman:

HealthEquity, Inc. (HealthEquity) is pleased to submit this comment letter in response to the Federal Deposit Insurance Corporation's (FDIC) publication of a notice of proposed rulemaking (NPR) entitled "Unsafe and Unsound Banking Practices: Brokered Deposits Restrictions."[1] This NPR follows the publication of an Advanced Notice of Proposed Rulemaking (ANPR) seeking input into the FDIC's treatment of brokered deposits in light of the significant changes in the provisions of financial services in recent years.[2]

HealthEquity provides Health Savings Accounts (HSAs) and other consumer-directed services to nearly 13 million individuals, either directly as an HSA custodian or as third-party administrator (TPA) for plan sponsors. Our partnerships include thousands upon thousands of employers, benefits advisors, and health and retirement plan providers.[3] In August 2019, HealthEquity acquired WageWorks, Inc. (WageWorks), a leading provider of HSAs and TPA of consumer directed benefit plans.

The efforts of the FDIC to involve the public in the rulemaking process, through the publication of both an ANPR and an NPR, are to be congratulated. It is evident that the FDIC understands that the current regulatory status of brokered deposits is unsatisfactory. We very much appreciate the work of the FDIC to modernize its treatment of brokered deposits in light of the changes in the provision of financial services and the range of new products that were not in existence when the brokered deposit legislation was first passed in 1989.[4]

The ANPR process gave us the opportunity to present important information to the FDIC concerning the nature and benefits of HSAs and the potential unintended consequences of treating HSA custodians as deposit brokers. We therefore request that our letter in response to the ANPR, dated May 2, 2019, become part of this rulemaking record, and that the information contained in

[1] 85 Fed. Reg. 7453 (Feb. 10, 2020).
[2] The ANPR was published for comment in the Federal Register on February 6, 2019. See 84 FR 2366 (February 6, 2019).
[3] More information about HealthEquity may be found at www.healthequity.com.
[4] Public Law 101-73 §224.

the letter, particularly the data related to the "stickiness" of HSAs, be considered when formulating the final rule. We also request that the letter submitted by WageWorks, May 16, 2019, in response to the ANPR be part of this submission. For your convenience, both letters are attached to this comment letter as Appendix A.

One overarching concern for HSA custodians, such as HealthEquity, is the need for regulatory certainty. This is crucial for both the business community and consumers. New and existing products and services offered by HealthEquity and other companies are designed to comply with regulatory mandates. When regulatory mandates are not clear and predictable, businesses face increased costs and legal uncertainty. These costs and delays ultimately are passed on to consumers through increased fees or delays in the development of new and innovative products and services. Both are harmful to our economy. In addition, regulatory uncertainty creates opportunities for regulatory arbitrage, which rewards companies willing to incur risk while penalizing companies that are risk adverse.

In summary, we applaud the efforts of the FDIC to establish bright lines in defining the scope of the deposit broker regulation, but believe that more can, and should, be done in this regard. Specifically, we recommend that the FDIC explicitly state that custodians of HSAs –

- Are excluded from the definition of a deposit broker under the terms of the statutory exclusions for trustees and administrators of employee benefit plans; or

- Are excluded from the definition of a deposit broker under the terms of the primary purpose exclusion, and, that, if an application procedure is established, applications by HSA custodians will be presumptively approved as long as all funds placed in depository institutions are placed in transaction accounts and the custodian does not pay interest or fees on any customer accounts.

In the balance of this letter, we review briefly the role of HealthEquity and the importance of HSAs in managing health care costs for consumers. We then provide more detailed comments specific to the NPR.

I. HealthEquity

As of year-end 2019, 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 5.3 million HSAs valued at approximately $11.5 billion.[5] In its capacity as a non-bank custodian, HealthEquity places HSA funds, at the direction of individual HSA holders, in one of three vehicles: (i) interest-bearing accounts for individuals at insured depository institutions and insured credit unions; (ii) interest-bearing group annuity contracts; or (iii) if an HSA exceeds a specified balance, in an open-end mutual fund made available on HealthEquity's platform.

[5] https://www.devenir.com/wp-content/uploads/2019-Year-End-Devenir-HSA-Research-Report-Executive-Summary.pdf

II. HSAs in General

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 of 2003.[6] HSAs are owned by HSA holders and remain the holder's property notwithstanding a change of employment, health plan, or retirement. HSAs have annual contribution limits, which in 2020, is $3,550 for individuals with self-only coverage and $7,100 for those with family coverage.[7]

HSAs are coordinated with HSA-qualified high-deductible health plans, of which the majority of such health plans are sponsored by employers. To be eligible to contribute to an HSA, an individual must be covered under an HSA-qualified high-deductible health care plan and have no additional health coverage (subject to exceptions for certain limited coverage), among other eligibility factors. HSA balances are available to pay or reimburse qualified medical expenses incurred before the deductible is reached, similar to other types of employer-provided health insurance or consumer-directed benefit accounts, such as Health Flexible Spending Arrangements (FSAs) or Health Reimbursement Arrangements (HRAs).

Like reimbursements from traditional health insurance, FSAs, and HRAs, distributions from HSAs are not subject to income tax if they are used to pay qualified medical expenses. In addition, individuals can claim a tax deduction for contributions they make to their HSAs; contributions by an employee through pre-tax deductions or 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.

Additionally, employers are subject to complex rules with respect to employee eligibility for HSAs. Employers must design their plans to be compatible with HSAs and sustain employee eligibility to open and contribute to HSAs. Likewise, if employers contribute to employees' HSAs, their contributions must be comparable (either the same amount or same percentage of the annual deductible limit) to all comparable participating employees.[8] If these eligibility rules are not satisfied, individual taxpayers largely shoulder the burden of penalties. For example, distributions taken before age 65 for other than qualified medical expenses are subject to ordinary income and payroll taxes, as well as a 20% additional tax. Similarly, contributions to an HSA that exceed the statutory allowable maximums are included in gross income and subject to normal income and payroll taxes, plus a 6% excise tax.

Finally, we note that the benefits of HSAs for consumers have been recognized by federal agencies and Congress. In a report to the President, the Secretaries of Health and Human Services, Treasury, and Labor acknowledged the important role that HSAs play in "expand[ing] personal

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[6] Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173.

[7] See IRS Publication 969.

[8] There are exceptions to the comparability rule if the contributions are made through a cafeteria plan, however the contributions must not discriminate in favor of highly compensated employees. Contributions that do not meet the comparability rules are subject to an excise tax of 35% of the amount contributed.

control and introduc[ing] more consumer power in the health care market."[9] The report recommends expanding access to HSAs so that "newly empowered health care consumers can make well-informed decisions about care."[10] Similarly, according to a report of the Congressional Joint Economic Committee, HSAs are lowering costs for medical care when combined with high deductible health insurance plans.[11] The report noted evidence that expanding access to HSAs will allow more Americans to realize benefits while accelerating overall health care cost containment. The report concluded that:

> HSAs give consumers greater control over how their money is spent….HSA[s] motivate consumers to carefully monitor health spending; question the necessity of retaking expensive tests; inquire into the availability of cheaper alternatives like generic drugs; and shop around for lower-price health care providers (e.g. doctors and medical supplies). At the same time, the HDHP offers protection from unexpected and excessive medical costs. There is growing evidence that consumer-directed plans reduce health care spending. By one estimate, if half of the employer-sponsored insurance policies incorporated HSAs, national savings in health care spending could total $57 billion annually.[12]

III. HSA Custodians Meet the Statutory Exclusions for Trustees and Administrators of Employee Benefit Plans

Section 29(g)(2) of the Federal Deposit Insurance Act provides nine exclusions from the definition of a "deposit broker."[13] Two of those exclusions are related to the trustees and administrators of employee benefit plans. Specifically, Sections 29(2)(D) and (E) exclude: (1) trustees of a pension or other employee benefit plan, with respect to funds of the plan; and (2) persons acting as a plan administrator or investment adviser in connection with a pension plan or employee benefit plan. The preamble in the NPR noted these provisions, but the proposed rule does not provide clarification as to how these exclusions will be implemented. We believe that an HSA custodian qualifies under both exclusions, and that the final rule should so specify.

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[9] Reforming America's Healthcare System Through Choice and Competition; https://www.hhs.gov/sites/default/files/Reforming-Americas-Healthcare-System-Through-Choice-and-Competition.pdf

[10] Id at 3.

[11] Joint Economic Committee, Republican Staff Study, The Potential for Health Care Savings: Can Health Savings Accounts Bend the Cost Curve? (Dec. 13, 2018).

[12] Id. at 16. 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.").

[13] 12 U.S.C. § 1831f(g)(2). In 1992, the FDIC added a tenth exception by regulation relating to Government sponsored programs for minority or women-owned depository institution programs. 57 Fed. Reg. 23933, 23040 (1992).

A. HSAs are Trusts

The Internal Revenue Code (IRC) and related regulations classify HSAs as "trusts" that are administrated by either a trustee or custodian.[14] The FDIC also has recognized that HSAs are trusts for purposes of deposit insurance.[15] Federal law requires that the trustee or custodian of an HSA be a bank, an insurance company, or another entity that has been approved by the Treasury Department to act in this capacity. HealthEquity has been so certified by the Treasury Department.

Treasury approval requires that HealthEquity, and other custodians of HSAs, demonstrate experience and continuing ability to manage the funds in accordance with all regulatory requirements. These obligations require the trustee or custodian to act in accordance with the lawful instructions of HSA 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.[16]

The Treasury Department's regulations also impose fiduciary-like obligations on the custodians of HSAs. Among other things, under these rules a custodian must demonstrate to the satisfaction of the Secretary of the Treasury: (i) an ability to act within the accepted rules of fiduciary conduct that are germane to the responsibilities of the trustee or custodian; (ii) experience and competence with respect to accounting for the interests of a large number of individuals; (iii) experience and competence with respect to other activities normally associated with the handling of retirement funds; (iv) an ability to adhere to applicable rules of fiduciary conduct as set out in the Treasury regulations; and (v) 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.

B. HSAs are IRA-Type Accounts, and Integral to Employee Benefit Plans

HSAs are an integral component of employer-sponsored consumer-directed health plans. To contribute to an HSA, an individual must be covered by a high-deductible health plan,[17] of which many are employer-provided.[18] 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

[14] 26 U.S.C. § 223 and 408; 26 C.F.R. §1.408-2.
[15] Opinion letter dated April 28, 2008.
[16] The standards for certification of a non-bank custodian of an HSA are the same as the standards applicable to trustees and custodians of Individual Retirement Accounts. See 26 C.F.R. §1.408-2; 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
[17] 26 U.S.C. § 223(c)(1)(A) (definition of "eligible individual"). *See also* IRS Publication 969.
[18] 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).

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 Employee Retirement Income Security Act of 1974 (ERISA) compliance obligations with respect to HSAs,[19] and employers typically follow that guidance – resulting in most HSAs being outside the scope of ERISA's requirements. This does not change 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 these reasons, HSAs should be treated as employee benefit plans for purposes of the FDIC's brokered deposit rule.

The term "employee benefit plan" is not defined in Section 29 of the FDI Act or implementing rules. Separate FDIC rules concerning the amounts covered by deposit insurance define "employee benefit plan" to have the meaning given that term in section 3(3) of ERISA. However, that rule also covers plans qualifying under section 401(d) of the IRC (Keogh plans for self-employed individuals), which often are not subject to ERISA.[20] Moreover, a legal opinion issued by the FDIC in 1986 states that "employee benefit plans" include plans qualifying under IRC §408(d) (IRAs),[21] which are not subject to ERISA. HSAs are IRA-type trust accounts that are grouped with IRAs by the IRS."[22] Further, Section 29 limits the exclusion for profit-sharing plans to those qualified under the IRC but contains no similar limitation for the exemption for employee benefit plans. These prior determinations clearly indicate that Congress did not intend to limit the employee benefit exclusion from the definition of deposit broker to ERISA qualified plans.

Finally, 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,

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[19] DOL, Field Assist. Bull. 2006-02 (Oct. 27, 2006); DOL Field Assist. Bull. 2004-01 (Apr. 7, 2004).

[20] FDI Act § 11(a), 12 U.S.C. § 1821(a); 12 C.F.R. § 330.14(f).

[21] 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.

[22] The IRS indicates that an entity approved by the IRS to be an IRA trustee is therefore qualified as an HSA trustee, and qualified funding distributions may be made from an IRA to an HSA (see IRS Publication 969). The IRS Nonbank Trustee Investigation Procedures lump HSAs and IRAs together under the definition of a "fiduciary account" and applies the same rules of fiduciary conduct to both (see Section 4.72.18.2.2 at https://www.irs.gov/irm/part4/irm_04-072-018). IRS Notice 2004-2, Q/A-20 compares an HSA to an IRA in the context of tax exemption. HSAs are subject to prohibited transactions rules that are like those that apply to IRAs, and HSAs are subject to similar investment restrictions as IRAs. HSA owners who have uncorrected excess contributions must report them using the same form as IRA owners (see IRS Form 5329, "Additional Taxes on Qualified Plans (Including IRAs) and Other Tax-Favored Accounts"). In addition, when signing the legislation authorizing HSAs in 2003, President Bush noted that HSAs are like IRAs (see "Remarks by the President at Signing of the Medicare Prescription Drug, Improvement and Modernization Act of 2003", page 1773) and it is also common for investment commentators to refer to HSAs as "health IRAs" given the similarities.

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 trust or custodial account isto pay or reimburse qualified medical expenses.

IV. HSA Custodians Meet the Primary Purpose Exclusion

The ninth statutory exclusion from the definition of deposit broker is for an agent or nominee ("a third party") "whose *primary purpose* is not the placement of funds with depository institutions."[23] Should the FDIC not explicitly exclude HSA custodians from the definition of a deposit broker, as we have recommended above, we recommend that FDIC find that HSA custodians meet the standards for the primary purpose exclusion. Moreover, if the FDIC establishes an application procedure for the primary purpose exclusion, we recommend that applications by HSA custodians be presumptively approved, as long as all funds placed in depository institutions are placed in transaction accounts and the third party custodian does not pay any interest or fees on any customer accounts.

As explained in the NPR, the "primary purpose" exclusion is based on the business relationship between the third party and its customers, and the exclusion will apply when "the primary purpose of the agent's or nominee's business relationship with its customers is not the placement of funds with depository institutions."[24] The primary purpose test is met when the third party is making the deposit for a substantial purpose other than: "(1) to provide deposit insurance, or (2) for a deposit-placement service."[25]

The NPR envisions a process in which a third party or a depository institution (on behalf of a third party) submits an application to the FDIC for a determination that the primary purpose standard has been met.[26] If the FDIC determines that the third party places less than 25 percent of the total assets under management,[27] in a particular business line, in insured depository institutions, the primary purpose test is met.[28]

If the third party places 25 percent or more of assets under management for a particular business line into insured deposits, the FDIC will conclude that the third party is not a deposit broker, if the deposit is made to enable the third party's customers to make transactions. Under the

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[23] Id. at §1831f(g)(2)(I).
[24] 85 Fed. Reg. 7459.
[25] Id.
[26] The application must include: (A) A description of the particular business line; (B) Total amount of customer assets under management for that particular business line; (C) Total amount of deposits placed by the third party on behalf of its customers, for that particular business line, at all depository institutions (other than brokered certificate of deposit);(D) A description of the deposit placement arrangements with all entities involved; (E) Any other information the applicant deems relevant; and (F) Any other information that the FDIC requires to initiate its review and render the application complete.
[27] "In determining the amount of customer assets under management by an agent or nominee, for a particular business line, the FDIC would measure the total market value of all the financial assets (including cash balances) that the agent or nominee manages on behalf of its customers that participate in a particular business line." Id.
[28] "The FDIC believes that if 75 percent or more of the customer assets under management of the third party is not being placed at depository institutions, for a particular business line, the third party has demonstrated that the primary purpose of that business line is not the placement of funds at depository institutions." Id.

proposed regulatory text, the FDIC will make this conclusion (and thereby grant the exception) if: "no interest, fees, or other remuneration, is being provided or paid on any customer accounts by the third party."[29]

If fees or other remuneration is paid by the third party on customer accounts, the FDIC will still grant an exception, but the applicant must demonstrate that the primary purpose of the deposits is to enable its customers to make transactions. Thus, the evidentiary burden is placed on the applicant.[30] The proposed regulation states that in making its case the applicant must provide the FDIC with detailed data about the business line, the extent to which funds are placed in insured institutions, revenue generated by the deposits, and the reasons why the applicant believes it qualifies for the exemption.[31]

A. Interest, Fees and Other Remuneration

As noted above, the proposed regulatory text states that if 25 percent or more of the assets under management in a particular business line are placed in insured deposits, the "primary purpose" exception will apply if "no interest, fees, or other remuneration, is being provided or paid on any customer accounts *by the third party*."[32] On the other hand, the explanatory material in the NPR states that "If the agent or nominee, *or the depository institution*, pays any sort of interest, fee, or provides any remuneration, (e.g., nominal interest paid to the deposit account), then the FDIC would more closely scrutinize the agent's or nominee's business to determine whether the primary purpose is truly to enable payments."[33]

There is thus a conflict between the regulatory text and the preamble explanation. The regulatory text triggers further FDIC investigation, and thereby regulatory uncertainty, only if the fees or remuneration are paid by the third party. The explanation triggers further FDIC investigation if the fees or remuneration are paid by the third party or the depository institution.

As discussed below, we believe that the payment of fees or other remuneration should not be a basis for determining if the primary purpose exemption is met. However, to the extent that the FDIC retains some form of this test, we urge that interest or fees ***paid by the depository institution*** should *not* be a factor in determining if the primary purpose standard has been met.

B. Interest, Fees and Other Remuneration Are Not Relevant Factors

The statutory language exempts "an agent or nominee whose primary purpose is not the placement of funds with depository institutions."[34] There is no indication that the statutory exemption is related to the interest rate paid or other remuneration to depositors. Logically, such payments have no relevance as to the primary purpose of the deposit. Rather, the primary purpose

[29] Proposed section 303.243(8)(ii).
[30] Proposed section 303.243(8)(iii) and (iv).
[31] Id.
[32] Proposed section 303.243(8)(ii). Emphasis added.
[33] Id. at 7459--7460. Emphasis added.
[34] 12 U.S.C. §1831f(g)(i).

test relates only to the purpose of the third party in making or facilitating the deposit.[35] Whether or not the depositor receives interest on his or her deposit has no bearing on the primary purpose of the third party agent.

Interest paid to the individual depositor can serve as an inducement to the consumer to opt for bank deposits as opposed to other investment opportunities offered by the third party. It also serves as an inducement to participate in the program offered by the third party. It can reduce or eliminate fees that the third party would otherwise charge the consumer. It may help in marketing the product or service. All of these are examples of legitimate business reasons for paying interest on deposits, but do not relate to the primary purpose of the third party, which in our case is the establishment and administration of HSAs, with cash placed in a bank, securities firm, or other vehicle. Simply put, the payment of interest is not an appropriate factor in ascertaining the primary purpose of the third party. This is especially true when the interest is at market rates and provides no special incentive to use bank deposits over competing investment alternatives, such as a money market mutual fund.

The NPR explains that one purpose of the proposal is to review the broker deposit rule in light of financial and technological developments. One of the most striking of these changes is the use of alternative payment methods, including debit cards and direct bank to bank transfers, without the need for paper checks. Payments by phone are becoming common, and it is not unusual to see consumers using Apple Pay and similar means to transfer funds to merchants. These payment technologies offer faster and much less expensive methods of transferring funds than traditional paper checks. Third parties are encouraging their customers to utilize these cheaper payment methods and may offer financial incentives to do so. It would not be surprising for companies to assist unbanked customers to open transaction accounts for the purpose of making payments and encouraging such customers through discounts or other remuneration. For example, an insurance company may decide that it will facilitate its customers opening of transaction accounts in a partner bank, and will encourage customer use of transaction accounts by offering a reduction in monthly premiums paid via electronic transfer from these accounts, rather than payments by paper check. The partner bank (which may be affiliated with the third party) may also encourage such deposits through the payment of interest. In this example, the customer is receiving remuneration from both the third-party insurance company (through a reduction in premiums) and through the payment of interest by the bank. But these payments do not change the fact that the primary purpose of the program is to reduce the use of paper check payments and encourage the use of alternatives, such as direct transfers.

In the context of HSAs, the primary purpose is to establish a trust and place in a transaction account that can be used to pay for qualified medical expenses. The use of transaction accounts provides both convenience and cost savings to the HSA holders and plan administrators. Aggregating funds in select banks reduces overhead costs for the administrator, and eases compliance concerns. Placing the funds into insured depository institutions also makes it possible to offer HSA holders cheaper alternatives to paper checks when paying for medical care, such as debit cards and electronic payments. Furthermore, aggregating deposits in a few select banks makes it easier for the custodian to keep track of payments and contribution limits and ensure that

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[35] The primary purpose exception "applies to an agent or nominee whose primary purpose is not the placement of funds with depository institutions." 85 Fed. Reg. 7548—7549.

the funds are being held in safe and regulated institutions. And since banking institutions are known and trusted, partnering with these institutions increases public participation in the HSA programs. The payment of interest on these accounts encourages consumer-driven health plan participation and reduces the overhead costs of plan and HSA administration. However, the payment of interest does not change the primary purpose of the third party: providing a means for the average citizen to economically participate in the HSA program.

We note that under the NPR the payment of interest or other remuneration does not mean that the exclusion automatically applies. The FDIC can still grant the exclusion on a case-by-case basis. However, since the presumption is no longer applicable, the burden shifts to the third party to convince the FDIC that it meets the primary purpose test. This creates a great deal of uncertainty and regulatory risk. By making individual institutions apply for an exclusion the playing field is not level in the same way it would be if they were all treated as exempt (or covered). The application process and resultant determination should not be dependent on whether or not an entity is savvy enough to file for an exclusion.

As a practical matter, HSA custodians need to know that the programs and plans that they devise will meet regulatory requirements and should be allowed to rely on clear regulatory boundaries. If the use of depository institutions for HSA programs are not categorically excluded from the rule, the planning for alternative arrangements must start immediately, and custodians must decide whether the continued use of insured depository institutions for HSA funds will have to be terminated or scaled back. There is no good public policy rationale for subjecting HSA custodians to this uncertainty, which will ultimately increase costs for HSA holders.

C. Interest Paid by Depository Institutions Should Not Be Discouraged

As noted, the regulatory text does not trigger further review if the *depository institution* pays interest on HSAs placed by third parties. The preamble takes a different approach and triggers further review if the bank or third party pays interest or other remuneration to the HSA holder. To the extent that the FDIC retains a test relating to the payment of remuneration, it should not apply to depository institutions.

A major source of earning for depository institutions is the "net interest margin." That is the difference between the cost of funds to the institutions, including the payment of interest on deposits, and the interest and other fees assessed on loans and other extensions of credit. In short, banking institutions use consumer deposits to increase earnings. Some of these earnings are returned to depositors in the form of interest.

If the final regulation adopts the language used in the NPR preamble, even well capitalized depository institutions will be penalized for paying interest on consumer deposits connected with HSAs, even if the interest paid on these accounts is at market rates.[36] As a result, insured institutions may insist on placing these funds into non-interest bearing accounts. If third party agents (i.e., HSA trustees or custodians) continue to place funds in insured depository institutions, the banking institutions will receive a windfall at the expense of consumers. Consumers will earn

[36] The "penalty" results from the treatment of brokered deposits for purposes of FDIC assessments and the liquidity rules.

no interest on their funds, discouraging participation in the HSA program. If part of the interest was used to offset third party costs, the loss of this source of income will result in the imposition of higher HSA custodial fees, again hurting consumers and their employers. Meanwhile insured institutions will have "free money" to lend at a profit. There is no public policy that justifies this result.

Congress recognized the benefits of paying interest on transaction accounts, including demand deposits, in the Dodd-Frank Act.[37] That legislation removed a prior ban on the payment of interest on demand deposits, and this change was supported by the banking agencies.[38] For example, the Federal Reserve Board noted that there are numerous benefits of allowing banking institutions to pay interest on demand deposits including enhancing the ability of attracting funds from less regulated segments of the financial system.[39] The NPR, on the other hand, would make it more difficult for banking institutions to attract HSA funds, and would instead encourage HSA administrators to seek alternatives to banks, such as money market mutual funds.

Any concerns that depository institutions will bid up interest rates on deposits in order to attract "hot money" are misplaced. In 1989, the original brokered deposit legislation defined a deposit broker to include any insured depository institution that offered rates of interest that are "significantly higher" than prevailing rates.[40] In 1991, Congress amended that limitation to institutions that are not well capitalized, and added a new section that prohibits undercapitalized insured institutions from offering deposit rates that are significantly higher than market rates on a local or national basis.[41] These statutes prevent troubled banks from bidding up rates to attract deposits. Under current law, only well capitalized banks are not restricted to market rates of interest. But well capitalized banks are not the institutions that *need* to bid up rates. Congress recognized this fact by exempting well capitalized institutions from the interest rate provisions that were adopted in 1989.

There is no statutory or policy reason for the FDIC to effectively impose penalties on interest payments for well capitalized banking institutions seeking to provide deposit services to HSAs administered by third parties. Arguably, the imposition of penalties on the payment of interest in connection with such accounts is contrary to the intent of Congress as seen in the 1991 amendment exempting well capitalized banks from the interest rate cap imposed on other banks, and the 2010 Dodd-Frank Act eliminating the last vestiges of depression era interest rate restrictions.[42] And, as noted previously, there should be no doubt that classifying a deposit as a brokered deposit works as a penalty, even for well capitalized banking companies.[43]

Further, as a practical matter, any concerns about brokered deposits leading to "interest rate wars" has been superseded by the development of the internet. Well capitalized banks can

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[37] Public Law 111-2203 §627.
[38] Source
[39] 76 Fed. Reg. 42018 (2011).
[40] Public Law 101-73 §224.
[41] See 12 U.S.C. § 1831f(h).
[42] It is worth noting that the Dodd Frank Act, Durbin Amendment specifically excluded accounts held under a bona fide trust agreement (which includes HSAs) from the interchange routing and exclusivity rules.
[43] See footnote 37, surpa.

easily increase interest rates on deposits and thereby funding through the internet and without the need of deposit brokers.

Finally, it should be emphasized that the NPR would treat the payment of *any* amount of interest as removing the third-party deposit from the safe harbor. Thus, even if a bank is paying market rates of interest on the deposit, the safe harbor is not available, and regulatory treatment of the deposit is thrown into question. This is more severe than the provisions in Section 29 that prohibit undercapitalized banks from offering interest rates that are "significantly higher" than market rates,[44] and adequately capitalized banks from paying rates on brokered deposits that "significantly exceeds" market rates.[45]

D. 100 Percent Transaction Account Requirement

The preamble in the NPR states that the primary purpose exemption applies if, among other criteria, the third party "places 100 percent of its customer funds into transaction accounts at depository institutions."[46] We interpret this to mean that the third party must place 100 percent of deposits into transaction accounts *at insured institutions*. Thus, a third-party administrator could offer its customers a choice of insured deposits and alternative investment vehicles, such as money market mutual funds. However, all deposits in insured institutions would have to be in transaction accounts and could not be split between checking and savings accounts. It would be helpful if the final regulation makes this clear.

E. The Primary Purpose of HSA Custodians is Not Deposit Placement

HSA custodians have the primary purpose of administering HSA funds in accordance with Section 223 of the IRC and other Treasury requirements.[47] Under federal law, HSAs are intended to provide a tax advantage method of paying for covered medical expenses. The funds are placed with insured depository institutions, or with other financial institutions, in order to effectuate this primary goal. The ability to use banking institutions to safeguard these funds and enable the quick and efficient transfer of money for the purchase of medical goods and services is the primary purpose of the deposit. These funds are not moved from one bank to another chasing the highest interest rate. As the FDIC stated in 1990, "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." [48] This is the case with HSA deposits.

F. HSA Custodians Should Receive Categorical Exemption

HSA custodians are a unique class of third-party managers, subject to extensive Treasury regulations and requirements, and due to the very nature of their business must have, as their

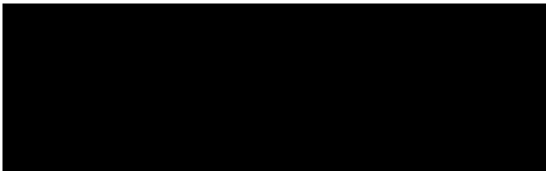
[44] 12 U.S.C. §1831f(h).
[45] 12 U.S.C. §1831f(e). Adequately capitalized institutions may only accept brokered deposits if they are granted a waiver from the FDIC. Otherwise only well capitalized institutions may accept these deposits.
[46] 85 Fed. Reg. 7459.
[47] 26 U.S.C. §223.
[48] FDIC Adv. Op. No 90-21 (May 29, 1990).

primary purpose, the implementation of the HSA legislation. The FDIC should recognize this special case and determine that these administrators categorically qualify for the "primary purpose" exclusion, provided all funds placed in depository institutions are placed in transaction accounts and the administrator does not pay any interest or fee on the accounts. This will provide real regulatory relief to an important class of bank customers, reduce costs for the public, and contribute to the nation's effort to provide cost effective medical care to the public. Moreover, if the FDIC establishes an application procedure for this exclusion, applications by HSA custodians should be presumptively approved as long as all funds placed in depository institutions are placed in transaction accounts and the HSA custodian does not pay any interest or fees on any customer accounts.

V. Conclusion

Custodians of HSAs are required by the Treasury Department to demonstrate a level of experience and ability to manage the funds in a safe and sound manner. In exercising this responsibility, custodians of HSAs place the funds in insured depository institutions. This practice should not result in the classification of the custodians as deposit brokers. The custodians of HSAs should be treated as trustees and administrators of employee benefit plans and thereby be excluded from the definition of deposit broker. Alternatively, the custodians of HSAs should be excluded from the definition under the primary purpose exclusion.

Sincerely,



Jody L. Dietel, CFCI, CAS, HSAe
Senior Vice President, Advocacy & Government Affairs

Appendix A

Comment Letters Submitted in Response to
the FDIC's Advanced Notice of Proposed Rulemaking (ANPR)

The following letters are attached, and incorporated into this comment letter by reference:

- HealthEquity, Inc. Comment Letter dated May 2, 2019
- WageWorks, Inc. Comment Letter dated May 16, 2019

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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

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]

[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

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[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.

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[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]

[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.

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[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.

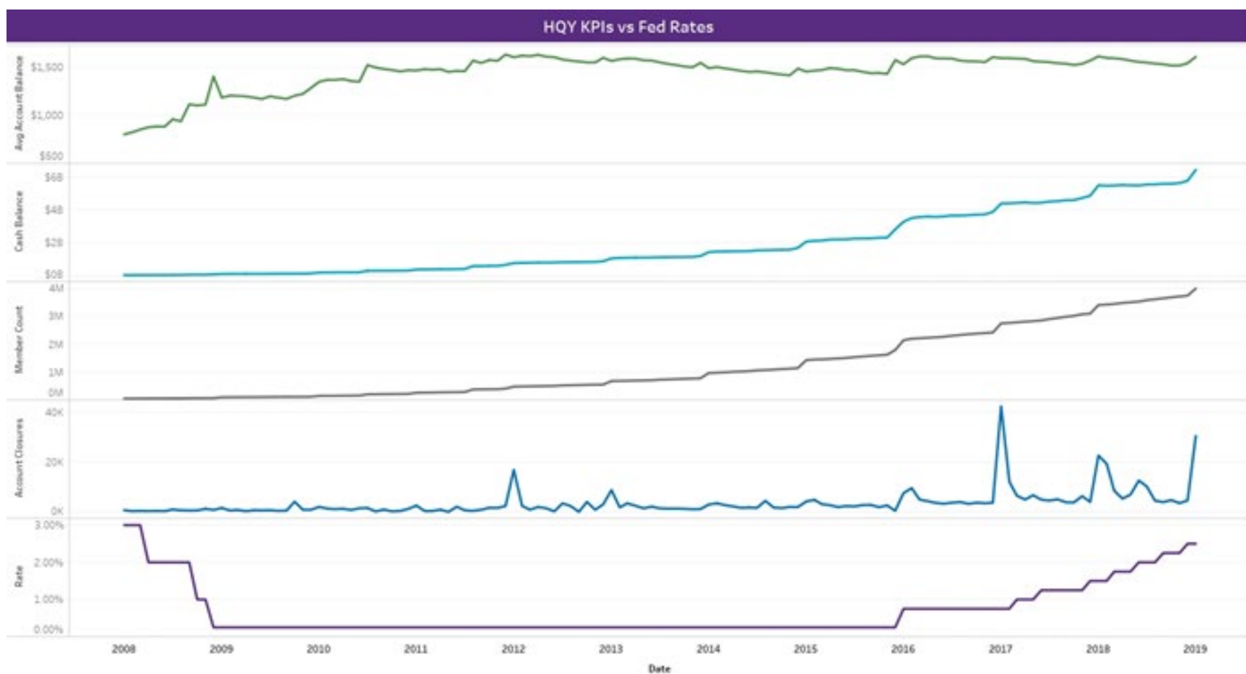
When the regulation was first proposed in the form of a Notice of Proposed Rulemaking (NPR) in January 1984, it did not contain the list of exceptions found in the final regulation and the statute.[58] As explained in the preamble, the final rule included the list of exemptions, in response to public 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.

[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/.

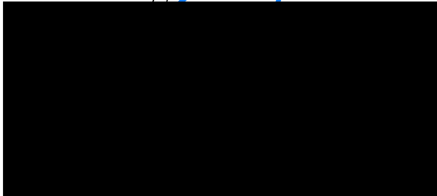
Conclusion

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,



Jon Kessler
Chief Executive Officer

WageWorks

May 16, 2019

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:

WageWorks, Inc. ("WageWorks") appreciates the opportunity to provide comments to the Federal Deposit Insurance Corporation ("FDIC") on its advanced notice of proposed rulemaking ("ANPR") on brokered deposits.

WageWorks is a leading provider of consumer directed-benefit accounts, including account-based benefit plans that provide benefits in areas such as health care, child-care, and commuting. In the health care arena, we provide administrative services for Health Savings Accounts ("HSAs"), Health Reimbursement Arrangements ("HRAs") and Health Flexible Spending Accounts ("Health FSAs"). WageWorks provides administration for more than 75,000 employers nationwide.

WageWorks appreciates the FDIC's efforts to undertake a review of their regulatory approach to brokered deposits. As part of this modernization effort, the FDIC should be mindful of the increasingly important role that HSAs play in proving health care dollars for Americans of all ages and walks-of-life. We urge the FDIC to continue to treat HSAs as core deposits to which the deposit broker rule are inapplicable.

COMMENTS

The FDIC points out in the ANPR that significant changes in technology and financial products creates the need for a review of the regulations and guidance constituting their approach to brokered deposits. Nowhere is this more true than with respect to HSAs, products which were not even conceived of until fifteen years after the passage of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA").

In passing FIRREA, Congress intended to place limitations on troubled banks holding significant dollars in risky deposits and investment products. Congress also desired to protect the deposit insurance system. In implementing these protections through FIRREA, Congress distinguished between entities providing banking and financial services, and entities acting as

"deposit brokers." See, Testimony of Hon. Frank H. Murkowski, U.S. Senator from the State of Alaska, "Insured Brokered Deposits and Federal Depository Institutions," Hearing before the Subcommittee on General Oversight and Investigations of the Committee on Banking, Finance and Urban Affairs, House of Representatives, 101st Congress, 1st Sess., 7 (May 17, 1989). Congress never intended deposits involving a direct, continuing relationship between a customer and a healthy insured depository institution – such as is the case with HSAs – to be considered "brokered".

Banks, insurance companies, and other institutions authorized by the Internal Revenue Service can serve as HSA custodians. HSAs are always owned by individuals – they are never owned by employers or other third parties. The FDIC has previously acknowledged the public benefit of HSAs. In a 2013 consumer advisory the agency noted that, with an HSA, "[y]ou can save money that can help you avoid a shock to your finances from a sudden large medical bill." See, FDIC Consumer Advisory Summer 2013. Confirmation that HSAs are not brokered deposits, and non-bank custodians are not deposit brokers, will help level the playing field and increase competition which will benefit HSA accountholders by enhancing innovation and reducing costs.

HSAs are an important and growing part of employer's health benefit offerings and are currently the only employer provided health benefit product that is portable. Denevir Research reports that there were in excess of 25 million HSAs at the end of 2018, which is 13% more than in 2017.[1] In a recent report to the President, the Secretaries of Health and Human Services, Treasury, and Labor acknowledged the important role that HSAs play in "expand[ing] personal control and introduce[ing] more consumer power in the health care market."[2] The report recommends expanding access to HSAs so that "newly empowered health care consumers can make well-informed decisions about care."[3] The FDIC's rule should line up with the recommendations of the Secretaries, rather than work against it.

In light of the above, we recommend that FDIC rules clarify the following:

1. HSAs are not brokered deposits.
2. Non-bank custodians of HSAs are not deposit brokers under the exception for trustees of employee benefit plans or under the primary purpose exception. Non-bank custodians are regulated by the Treasury Department and have the primary purpose of administrating these accounts consistent with Treasury's regulations and their fiduciary duties to accountholders.
3. The placement of HSA funds in insured accounts is only incidental to the primary purpose of non-bank custodians.

[1] http://www.devenir.com/research/2018-year-end-devenir-hsa-research-report/

[2] https://www.hhs.gov/sites/default/files/Reforming-Americas-Healthcare-System-Through-Choice-and-Competition.pdf

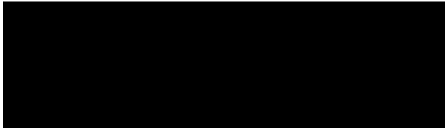
[3] https://www.hhs.gov/sites/default/files/Reforming-Americas-Healthcare-System-Through-Choice-and-Competition.pdf, page 3

4. Exempting HSA deposits and Treasury-regulated non-bank custodians from FDIC rules serves public policy by allowing consumers to benefit from increased competition, innovation, and reduced costs provided by non-bank custodians of HSAs.

CONCLUSION

WageWorks appreciates the opportunity to provide comments regarding ANPR. Due to the policy goals underlying HSAs and ownership characteristics, we urge the FDIC to continue to treat HSAs as core deposits. We respectfully suggest that the FDIC's deposit broker rules should continue to be considered inapplicable to HSAs. We would be happy to respond to follow up questions as needed. Please feel free to contact me at Jody.Dietel@WageWorks.com or 650.577.6372 with any questions or areas needing further clarification.

Sincerely,



Jody L. Dietel, ACFCI, CAS
Chief Compliance Officer
WageWorks, Inc.

Cc: Rachel Leiser Levy, Groom Law Group