American Bankers Association
HSA Council

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

Re: [Brokered Deposits RIN 3064-AE94]

Dear Mr. Feldman:

Thank you for the opportunity to comment on the Federal Deposit Insurance Corporation's (FDIC or Agency) notice of proposed rulemaking (NPR) on brokered deposits. The American Bankers Association's Health Savings Account Council represents about ninety-four percent of all the Health Savings Accounts (HSAs) in the United States and the millions of Americans who finance their healthcare with these plans.

We applaud the comprehensive efforts FDIC has made to modernize this regulation including its two-part reform strategy. Since reform of Section 29 of the Federal Deposit Insurance Act (FDIA) as part of the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) of 1989, significant changes in technology and financial product evolution warrant reconstitution of the regulations and guidance that together constitute the FDIC's approach to brokered deposits. In that regard, please make our letter of May 7, 2019, addressing the FDIC's ANPR, part of the record.

Congressional Intent

FIRREA set restrictions on the acceptance of brokered deposits by institutions with *weakened capital positions* and was intended to isolate funds placed by entitites *whose primary business* is "placing deposits or facilitating the placement of deposits of third parties" to insured depository institutions.

Congress, through FIRREA, intended to restrict troubled banks from holding significant quantities of risky deposits, which were bundled by intermediaries bringing together investors and investment products. Additionally, congress intended to distinguish between providing a banking or financial service and acting as a "deposit broker."

Congress also intended to insulate the deposit insurance system, in the words of Senator Murkowski (R-AK), "from troubled institutions that take excessive risks and leave the taxpayers to suffer the consequences. By preventing troubled institutions from using brokered deposits – unless permitted to do so by the FDIC – we accomplish this goal and create accountability on the part of the FDIC."[1]

Congress never intended deposits involving a direct, continuing relationship between a customer and a healthy insured depository institution to be considered "brokered" deposits as the quote from Senator Murkowski, FIRREA's co-sponsor, makes abundantly clear.

History, Growth of HSAs and Ownership

The HSA statute was enacted by congress as part of the Medicare Prescription Drug Improvement and Modernization Act of 2003.[2] Tens of millions of Americans now finance their healthcare with an HSA and the HSA-qualifying insurance that goes with it[3]. HSAs are a growing feature of both American healthcare financing and increasingly, retirement planning.

HSAs are owned by account holders and remain the account holder's property even if they change jobs, health plans or retire. Under federal law, an HSA is a "trust" or "custodial account" administrated by a trustee or custodian.[4] Trustees or custodians must be banks, insurance companies, or entities credentialed by the Treasury Department to act in this capacity.

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.

In other words, HSAs are an important and growing part of employee benefit strategies and are the only health benefit product in the United States that is portable. They were specifically designed so that employees who move from job to job can associate their HSA with their new employer's HSA-qualifying health plan. This is possible because HSAs are owned by individuals, in all cases, not employers or any other third party - there are no exceptions to this rule.

[1] 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) (emphasis added); *see also id.* at 71 (written testimony). The purpose of this hearing was to update the record on brokered deposits following a prior hearing by the House General Oversight Subcommittee during the 99th Congress on July 16, 1985.

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

[3] Devenir Research reports that there are more than 28 million HSAs at the end of 2019, which is 13% more than in 2018. Devenir estimates enrollment will exceed 30 million health savings accounts in 2020.

[4] 26 U.S.C. § 223 and 408; 26 C.F.R. §1.408-2.

The choice to open, close or move their account to any willing trustee or custodian remains with the account-holder. For this reason, Health Savings Accounts should be excluded from the scope of this regulation.

Applicability of Proposed Exceptions

Should the Agency decide to keep deposits associated with HSAs within the scope of the regulation, there are specific exemptions within Section 29 from the deposit broker definition for the trustee of a pension or other employee benefit plan, with respect to funds associated with the plan, and for a person acting as a plan administrator or investment adviser in connection with a pension plan or employee benefit plan.

Neither Section 29 nor its implementing rules define the term "employee benefit plan." A rule concerning the amounts covered by deposit insurance define "employee benefit plan" as having the meaning given that term in section 3(3) of the Employee Retirement Income Security Act of 1974 (ERISA), as well as a plan qualifying under section 401(d) of the Internal Revenue Code (Keogh plans for self-employed individuals), which often are not subject to ERISA.[5]

A legal opinion issued by the FDIC in 1986 states that "employee benefit plans" include plans qualifying under IRC §408(d) (IRAs),[6] which are not subject to ERISA. Further, Section 29 limits the exclusion for profit-sharing plans to those qualified under the tax Code, but contains no similar limitation for the exemption for employee benefit plans, clearly implying that Congress did not intend to limit the employee benefit exemption to ERISA qualified plans.

HSA-qualified insurance plans, known as High Deductible Health Plans (HDHPs) pursuant to IRS regulation[7], are very popular employee benefit plans. In order to open and contribute to an HSA, an individual must be covered by an HDHP, which is a type of employee welfare benefit plan.[8] In addition, its also clear that because HSAs specifically allow asset accumulation and investment, just like other employer provided retirement plans such as 401(k)s, HSAs are an integral component of retirement and pension planning.

We should also stress that HSA-qualified insurance plans are available in state-regulated insured markets, like the state exchanges set up under the Affordable Care Act. We do not

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[5] FDI Act § 11(a), 12 U.S.C. § 1821(a); 12 C.F.R. § 330.14(f).
[6] 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.
[7] 26 U.S.C. § 223(c)(1)(A) (definition of "eligible individual"). *See also* IRS Publication 969.
[8] 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).

believe funds accumulated through administration of individual market HSAs should be treated any differently than HSAs associated with employer-sponsored plans for the same reason mentioned earlier:

HSAs are owned by individuals, in all cases, the primary purpose of which is to pay for qualified medical expenses.

The preamble in the NPR discussed these exemptions, but the language of the rule does not provide clarification as to how these exemptions will be implemented. We feel strongly that an HSA custodian qualifies for this exemption and the final rule should affirm this interpretation.

Conclusion

The FDIC's effort to modernize the deposit broker rules is a welcome one and we look forward to participating in this important work. In light of their stated purpose and ownership characteristics, we recommend that HSAs continue to be treated as they are currently, which is as core deposits.

We respectfully suggest that the FDIC's deposit broker rules should be considered inapplicable to these products by definition or in the alternative, considered exempt from the rule.

Respectfully,

[redacted]

J. Kevin A. McKechnie
Executive Director