PAYFLEX®

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(For outgoing mail only)

June 9, 2020

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

**Re: Proposed Rules for Unsafe and Unsound Banking Practices: Brokered Deposits Restrictions (RIN 3064-AE94)**

Dear Mr. Feldman:

PayFlex Systems USA, Inc. ("PayFlex") thanks you and your team for the opportunity to comment on the Federal Deposit Insurance Corporation's (FDIC) notice of proposed rulemaking (NPR) on brokered deposits. We appreciate the FDIC's commitment to promoting safe banking practices, especially in light of the technological advances and banking practices that have evolved since brokered deposits were first regulated over thirty years ago.

PayFlex respectfully requests that the final regulations, which will include updated definitions for "deposit broker" and "brokered deposits", specifically exclude deposits made to a Health Savings Account (HSA). Further we request that the FDIC classify deposits to, and funds held in, an HSA as core deposits to further avoid confusing HSA funds with brokered deposits.

**Health Savings Accounts**
HSAs are tax-advantaged trust accounts that help millions of Americans pay and save for healthcare expenses. Introduced as part of the Medicare Prescription Drug Improvement and Modernization Act of 2003[1], HSAs continue to grow year over year in account volume, total assets, and average balance[2].

HSA eligibility is tied to coverage under an HSA-qualified high-deductible health plan; therefore, the majority of HSAs are administered as part of an employer-sponsored benefits plan. HSAs are governed by, and administered according to, Section 223 of the Internal Revenue Code[3] and further clarified by the Department of the Treasury and the Internal Revenue Service (IRS) in various regulatory guidance.

This governance includes eligibility requirements, contribution limits adjusted annually for inflation, excess contribution rules, the use of HSA funds for the qualified expenses of a spouse

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[1] Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173.
[2] https://www.devenir.com/wp-content/uploads/2019-Year-End-Devenir-HSA-Research-Report-Executive-Summary.pdf
[3] 26 U.S.C. 223.

and tax dependents as well as for the accountholder, the tax treatment for deposits to and withdrawals from an HSA, tax reporting requirements, the designation of one or more beneficiaries, and the appropriate tax treatment in the event of the accountholder's death.[4]

HSAs offer consumers three ways to save on healthcare expenses. Deposits to the HSA are tax-free. When contributing through their employers' payroll, contributions are deducted from accountholders paychecks before income and other payroll taxes are applied. For those accountholders who benefit from an employer's contribution to the HSA (i.e., contributions outside of payroll), those contributions are also tax-free. Withdrawals from the HSA to pay for eligible healthcare expenses are done so without paying taxes on the withdrawal amount. As HSAs are interest-bearing accounts, the interest earned on the HSA funds are also tax-free.

An additional benefit for accountholders is the option to invest their HSA funds in investment offerings made available through the custodian as part of the HSA program. HSAs are designed for short- and long-term planning relative to healthcare needs and expenses. Health Savings Accounts are, therefore, a key component to retirement planning alongside other employer-sponsored retirement plans such as 401(k)s; planning for future healthcare costs in retirement is just as important as planning for retirement income.

Though HSAs are generally offered through an employment arrangement as part of an employer's comprehensive benefits plan, the accountholder, and not the employer, owns the account. The balance in the HSA is nonforfeitable; the employer does not have a right to "claw-back" or re-claim any funds that have been deposited into the HSA outside of two limited circumstances.[5] The account is unique in its portability, in that it goes with the accountholder without regard to where the accountholder may be employed.

Accountholders commonly have a debit card linked to the HSA, allowing for efficient and timely access to their funds. Generally, accountholders also have other means with which to access their funds for the payment or reimbursement of qualified healthcare expenses, including HSA withdrawals that may be deposited directly into their personal bank account, reimbursement via check, and payment from the HSA made directly to the provider.

We highlight these aspects of the HSA to underscore the stability of the accounts, the high degree of oversight and regulatory requirements in their administration and use, to emphasize the degree of ownership and control that accountholders have over their HSA funds, and to understand their context within an employee benefits plan.

HSAs have been recognized for the value they bring to consumers. The Secretaries of Health and Human Services, Treasury, and Labor, in their 2018 report to the President, lauded HSAs as a means to "expand personal control and introduce more consumer power into the health care market" and make the recommendation to expand HSA access.[6] Individual states are also recognizing and acknowledging the value of HSAs. For example, in its final report to Governor Ned Lamont, the Connecticut High Deductible Health Plan Task Force has recommended

[4] See IRS Publication 969.

[5] IRS Notice 2008-59, 2008-29 I.R.B. 123, questions and answers 23, 24, and 25.

[6] 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.

expanding access to HSAs and expand the means to which consumers can contribute to an HSA, recognizing that these accounts give consumers more control over their healthcare costs.[7]

**HSA Deposits Excluded from Brokered Deposits**
In stating our request and recommendation to exclude HSA deposits from brokered deposits, we cite two of the nine statutory exclusions to the definition of deposit broker, as allowed for in Section 29(g)(2) of the Federal Deposit Insurance Act – the exemption for trustees and administrators of employee benefit plans and the primary purpose exclusion.[8]

**Exclusion for Trustees and Administrators of Employee Benefit Plans** – For employers that offer HSA-qualified High Deductible Health Plans, HSAs are a key component to their benefits offerings. These employers look to custodians, including non-bank custodians such as PayFlex, to administer HSA plans on behalf of their participating employees. A non-bank custodian or trustee is established and approved per Treasury regulations.[9] The qualifications required for approval to serve as a non-bank custodian/trustee are stringent and the entity requesting this status must show continuity, demonstrated fiduciary experience, rules of fiduciary conduct relative to administering retirement plans, and a high degree of solvency, financial responsibility, and fitness to manage funds.[10] The current list of approved non-bank trustees is select, at 68 entities with nine percent (9%) of those being HSA non-bank custodians/trustees.[11] This further emphasizes the stability of HSA custodians in their oversight responsibilities of HSA holders' funds.

The services that PayFlex and other HSA custodians and administrators provide help these employees to make the most of their HSAs through education, online account access, tools to manage their account, and a means to deposit, access, and invest their funds for immediate use and long-term healthcare planning.

PayFlex and other administrators and non-bank custodians rely on their partnerships with depository institutions to offer safe handling and holding of the funds, leveraging the institutions' banking expertise and tenure. In these banking arrangements, HSA administrators and non-bank custodians do not play the role of a broker in that they are not acting as an intermediary. Rather, administrators and non-bank custodians provide a safe and secure framework that leverages the expertise of the banking industry with the expertise of employee benefits administration.

**Primary Purpose Exclusion** – This exclusion specifically states that the entity is excluded because its "primary purpose is not the placement of funds with depository institutions."[12] PayFlex and other HSA custodians are not in the business of placing funds or deposits with depository institutions. Rather, we are all in the business HSA administration, providing benefits administration services to plan sponsoring employers and accountholders. Accepting, holding, and disbursing the funds at the direction of the accountholders requires the placement of these

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[7] High Deductible Health Plan Task Force Final Report, February 24, 2020. https://www.cga.ct.gov/ins/tfs/20190822_High%20Deductible%20Health%20Plan%20Task%20Force/final%20report%20Feb%202020/High%20Deductible%20Health%20Plan%20Task%20Force%20Final%20Report%20pgs%201-149.pdf

[8] 12 U.S.C. §1831f(g)(2). In 1992, the FDIC amended its regulations to add a tenth exception to exclude government entities administering to minority or women-owned deposit programs. 57 Fed. Reg. 23933, 23040 (1992).

[9] Treasury Regulation Section 1.408-2(e) through 1.408-2(e)(8).

[10] See Application Procedures for Nonbank Trustees and Custodians. https://www.irs.gov/retirement-plans/application-procedures-for-nonbank-trustees-and-custodians.

[11] See Nonbank Trustees Approved as of April 1, 2020. https://www.irs.gov/pub/irs-tege/nonbank_trustee_list.pdf.

[12] §1831f(g)(2)(1).

funds with a depository institution. Therefore, the association between a custodian/trustee and the depository institution is secondary to the relationship between the custodian/trustee and accountholder.

Per the NPR, the FDIC is proposing an application process to vet entities seeking this exclusion.[13] The intent of this scrutiny is to weed out those entities inappropriately seeking this exclusion. We believe that entities such as PayFlex are appropriately applying this exclusion to the administration of HSAs. The primary purpose of HSA administration is transactional, in order to facilitate deposit and withdrawal transactions. In fact, the establishment of the accounts and the means to access the funds held in the accounts are designed for transactional activity, including various means to deposit funds, e.g., via the employer, lockbox, electronic fund transactions (EFTs); withdraw funds via the debit card, EFT withdrawals, and check payments; and the transfer of funds into and out of investment accounts, with the intention of transfers out from investments to allow for the payment of eligible healthcare expenses. Further, alerts and other messaging are designed to help accountholders keep track of transactional activity within their accounts (e.g., alerts that track to the level of contributions, balances, and withdrawal activity).

Finally, we agree with other commenters in that any interest paid or earned on these funds is irrelevant to the primary purpose test. As stated previously, the ability to collect interest on the funds held in the HSA is part of the value of the HSAs in building a balance that will support the need to pay healthcare expenses now and in the future. In fact, accountholders who save their funds in an HSA in preparation for future healthcare expenses should expect to earn interest on those funds as they would in any type of account where their funds are held.

**PayFlex**

As part of the CVS Health® family of companies[14], PayFlex is a leading national administrator for health care accounts that complement employers' health care and wellness programs. We started in 1987 and now have over 30 years of experience providing account-based health care solutions. Our products include health savings accounts (HSAs), flexible spending accounts (FSAs), health reimbursement arrangements (HRAs) and well-being reimbursement accounts (WRAs).

**Conclusion**

HSA Custodians are required to adhere to the statutory and regulatory requirements set forth by the Treasury Department. As the safekeeper of assets, custodians serve as trustees and administrators, placing the funds in insured depository institutions. HSA custodians, in supporting the transactional needs of accountholders to save and pay for healthcare, are not deposit brokers and, therefore, should not be deemed as such.

We thank you again for the opportunity to respond to the notice of proposed rulemaking as you seek to bring current the regulations regarding deposit brokers and brokered deposits.

Sincerely,

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[13] 85 Fed. Reg. 7459.

[14] More information about PayFlex may be found at https://www.payflex.com/.