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June 9, 2020

Via Email (comments@fdic.gov)

Mr. Robert Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th St, N.W.
Washington, DC 20249

Re: RIN 3064-AE94; Unsafe and Unsound Banking Practices: Brokered Deposits Restrictions

Dear Mr. Feldman:

ConnectYourCare, LLC ("ConnectYourCare") submits this comment letter in response to the Federal Deposit Insurance Corporation's (the "FDIC's") publication of the Notice of Proposed Rulemaking (NPR) titled "Unsafe and Unsound Banking Practices: Brokered Deposits Restrictions." Thank you for the opportunity to comment.

ConnectYourCare is an Internal Revenue Service ("IRS") designated non-bank trustee ("NBT") serving as custodian for Health Savings Accounts ("HSAs") and as a third party administrator ("TPA") of HSAs, flexible spending accounts ("FSAs"), health reimbursement arrangements ("HRAs"), and other account-based employee benefits. ConnectYourCare asks the FDIC to clarify that non-bank HSA custodians are not deposit brokers.

I. HSA/NonBank Trustee Overview

The Medicare Modernization Act of 2003 created HSAs as a tax-exempt trust account managed by a trustee or custodian that is a bank, an insurance company, or an NBT.[1] HSAs are individually-owned, portable accounts allowing individuals and employers to contribute funds on a tax preferred basis when an individual is enrolled in a high deductible health plan ("HDHP.") In the majority of cases, the HDHP is sponsored by an employer, and the HSA is an integral part of the employer's health care offering. HSAs are designed to allow an accountholder's balance to grow and be used for qualified medical expenses on a tax preferred basis.

In order to be designated a Non-Bank Trustee, an entity must "demonstrate in detail its ability to act within the accepted rules of fiduciary conduct."[2] This demonstration must include proof of ability to continue operations, an established location, fiduciary experience, fiduciary responsibility, and financial

[1] 26 U.S.C. § 223.
[2] 26 C.F.R. § 1.408-2(e)

responsibility.[3] To be designated, an entity must prove a capacity to account and fitness to handle funds.[4] The designee must also agree to adhere to rules of fiduciary conduct, including to maintaining adequate net worth.[5] ConnectYourCare, as a designated Non-Bank Trustee, has a continuing obligation to satisfy these requirements.

II. Role as HSA Custodian and Administrator

Similar to traditional trust arrangements, HSA accountholders, or the HSA beneficiary, have a contractual relationship with the non-bank HSA custodian. ConnectYourCare, with its NBT designation, serves as a non-bank HSA custodian to HSA accounts. The non-bank HSA custodian is responsible for safekeeping of the HSA assets and performs other functions including, but not limited to, providing statements and disclosures, applying interest to the HSA account, accepting deposits and other HSA account contributions, performing customer due diligence and ongoing transaction monitoring for suspicious activity, and filing required tax forms. In ConnectYourCare's role as non-bank HSA custodian, it must work with depository banks to hold and safeguard the assets of HSA accountholders. To accomplish this, ConnectYourCare partners with well-capitalized FDIC Member banks to hold the HSA assets.

ConnectYourCare also serves as a TPA for its employer clients. As the TPA, ConnectYourCare facilitates, coordinates and manages the employer's interaction with the HSA, for example, managing employee enrollment and reconciling payroll contributions.

III. Brokered Deposit Rule and Employee Benefit Plan Exceptions

Section 29 of the Federal Deposit Insurance Act regulates the deposits of "Deposit Brokers."[6] Deposit Broker is defined as "any person engaged in the business of placing deposits, or facilitating the placement of deposits, of third parties with insured depository institutions…"[7] ConnectYourCare, in its role as non-bank HSA custodian must place deposits of funds held for the benefit of its accountholders with depository institutions. Absent an exclusion, ConnectYourCare and other non-bank HSA Custodians could likely be viewed as Deposit Brokers if they deposit funds with insured depository institutions.

However, in relevant part, the Federal Deposit Insurance Act provides exclusions for a i) "trustee of a pension or other employee benefit plan, with respect to funds of the plan" and ii) "a person acting as a plan administrator or investment advisor in connection with a pension plan or other employee benefit plan that that person is performing managerial functions with respect to the plan."[8] There are strong arguments that non-bank HSA custodians currently meet these exclusions as employee benefit plans are largely undefined and the majority of HSA accounts are established as part of an employer's benefit offering. The FDIC should clarify that non-bank HSA custodians qualify under each of those exclusions in the final rule

[3] Id.
[4] Id.
[5] Id.
[6] 12 U.S.C. §1831f(g)(2)
[7] 12 U.S.C. §1831f(g)(2)
[8] 12 U.S.C. §1831f(g)(2)

to give certainty to both non-bank HSA custodians and the insured depository institutions holding HSA funds. This certainty would help to expand the availability HSAs and the success they have had in the marketplace.

As discussed above, HSAs are defined by statute as trusts and may be managed by either trustees or custodians.[9] The FDIC has affirmed that HSAs are trusts for the purposes of deposit insurance.[10] These trusts are most often opened as part of an employment relationship and are tied to an employer-sponsored group health plan. Generally, HSAs are not subject to ERISA so long as they comply with two Field Assistance Bulletins ("FABs") issued by the Department of Labor.[11] While most HSAs are not subject to ERISA, the Department of Labor saw that they were closely tied to the employer relationship that explicit guidance was required to shield the HSA from becoming subject to ERISA's requirements.

Health Savings Accounts are an integral part of an employer's benefit offering. They are essential to the modern citizen's ability to pay for medical care in the present and future. As with other employee benefits accounts, HSAs are a stable account with the purpose of accomplishing public good through private action. HSAs are not a vehicle for risky investments and short-term returns. Instead, they are accounts where individuals hold stable and growing balances to pay for current and retiree medical expenses.

C. Conclusion

Clarification by the FDIC that non-bank HSA custodians are excluded from the definition of "Deposit Broker" would grant certainty to insured depository institutions about the status of HSA deposits and would allow for expanded offerings of HSAs. HSAs are integral to this country's changing health care landscape. ConnectYourCare respectfully requests that the FDIC confirm that non-bank HSA custodians are not deposit brokers in its Final Rule.

ConnectYourCare appreciates the opportunity to provide comments on the proposed rule. If you have any questions regarding our comments, we would be happy to respond to respond to questions by phone at 410-891-1003 or email at Harrison.Stone@connectyourcare.com.

Sincerely,

[redacted]

Harrison Stone
General Counsel
ConnectYourCare, LLC

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[9] 26 U.S.C. § 223 and 408; 26 C.F.R. §1.408-2.
[10] Opinion letter dated April 28, 2008.
[11] FAB 2004-01 and FAB 2006-02.