April 26, 2019

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Attention: 3064–AE94

To whom it may concern,

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

The ANPR was published by the Federal Deposit Insurance Corporation (FDIC) on February 6, 2019.

1. Introduction

HCB serves as a custodian for health savings accounts. HCB's business model is to contract with third party administrators (TPAs), which in turn contract directly with employers for HSA administrative services. TPAs perform certain banking functions on behalf of HCB in exchange for compensation from the bank, and collect and transfer HSA contributions from employers and employees to bank, where they are allocated to individual accounts. Individuals have the option of investing their HSA balances in a lineup of mutual funds.

The business is based on cost, service and relationships. HCB works with thousands of employer groups, primarily small employers, and its TPA contractors have personal relationships with each decision-maker. There is little if any price sensitivity of demand based on interest rates; employers select HSA custodians based on monthly administration fees and service. Interest rates on HSAs at HCB and nationwide typically reflect rates paid on ordinary demand deposits in the same market area. These small, stable accounts are ideal for reducing risk and volatility in any bank's balance sheet.

According to the Kaiser Family Foundation, among firms offering health benefits, 22% offer an HSA-qualified high deductible health plan (HDHP). In 2018, 19% percent of covered workers were enrolled in HSA-qualified HDHPs. On average, covered workers enrolled in HSA-qualified HDHPs receive an annual employer contribution to their HSA of $603 for single coverage and $1,073 for family coverage.[1] Millions of American workers access HSAs made available by their employers. Devenir Research reports that

[1] Kaiser Family Foundation & Health Research & Educational Trust. Employer Health Benefits 2018 Annual Survey. October 3, 2018. http://files.kff.org/attachment/Report-Employer-Health-Benefits-Annual-Survey-2018.

there were more than 25 million HSAs at the end of 2018, which is 13% more than in 2017.[2]

As a matter of public policy, it is critical to promote continued growth of individual savings through HSAs. A recent article by CNBC reports that 66.5 percent of all bankruptcies are tied to medical issues.[3] The personal finance website Bankrate found reported that only 40 percent of Americans have enough saved to cover a $1,000 emergency expense.[4] According to a study by Fidelity, a couple retiring in 2018 would need an estimated $280,000 to cover health care costs in retirement.[5] As a result of increasing health care costs, 85% of covered workers have a general annual deductible for single coverage that must be met before most services are paid for by the plan.[6] Lower-income patients with diabetes are more likely to have medical debt, and 2.5 times more likely to delay or avoid care compared with those without debt.[7] A 26-year-old Minnesotan with Type-1 diabetes died in 2017 after rationing his insulin because he couldn't afford the cost.[8]

The Kaiser study cited above found that 26% of covered workers in an HSA-qualified HDHP receive account contributions that, if applied to their deductible, would reduce their deductible to less than $1,000.[9] These numbers may be improved by promoting and supporting HSAs and the regulatory environment in which they are made available.

HSAs are among the most stable deposits at HCB. These are relationship deposit customers, rather than customers who focus on yield. They don't pose the same risks as those brokered deposits targeted by Section 29 of the Federal Deposit Insurance Act (FDI Act). An overbroad definition of "deposit broker" applicable to HSAs will impose unnecessary cost and stigma on otherwise stable deposits. This in turn will have significant unexpected consequences with little to no reduction in volatile or risky assets held by banks. As a matter of public policy, the growth of HSAs must be encouraged and promoted.

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[2] Devenir Research. 2018 Year-End Devenir HSA Research Report, February 27, 2019. Accessible at: http://www.devenir.com/research/2018-year-end-devenir-hsa-research-report/.
[3] CNBC. This is the real reason most Americans file for bankruptcy (February 11, 2019). Accessible at: https://www.cnbc.com/2019/02/11/this-is-the-real-reason-most-americans-file-for-bankruptcy.html
[4] Survey: Most Americans wouldn't cover a $1K emergency with savings. Accessible at https://www.bankrate.com/banking/savings/financial-security-january-2019/
[5] A Couple Retiring in 2018 Would Need an Estimated $280,000 to Cover Health Care Costs in Retirement, Fidelity® Analysis Shows." Fidelity. April 19, 2018. https://www.fidelity.com/about-fidelity/employer-services/a-couple-retiring-in-2018-would-need-estimated-280000
[6] Employer Health Benefits 2018 Annual Survey, *Ibid.*
[7] Rabin, David L. et. al. "Among Low-Income Respondents With Diabetes, High-Deductible Versus No-Deductible Insurance Sharply Reduces Medical Service Use." American Diabetes Association (Feb. 2017). Accessible at: http://care.diabetesjournals.org/content/40/2/239.
[8] "Son's death pushes Minnesota mom into fight against high, rising drug prices," Star Tribune (May 18, 2018): accessible at: http://www.startribune.com/son-s-death-pushes-mom-into-drug-price-spotlight/482344871/.
[9] Employer Health Benefits 2018 Annual Survey, *Ibid.*

2. HSAs established by employers are "employee benefit plans" for purposes of statutory exemptions from the definition of "Deposit Broker"

Section 29 of the FDI Act and the FDIC's brokered deposit rule at 12 C.F.R. § 337.6, define "Deposit Broker" in part as "[a]ny person engaged in the business of placing deposits, or facilitating the placement of deposits, of third parties with insured depository institutions. . ..“ The definition is subject to statutory exceptions, including the following:

- 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.
- The trustee of a pension *or other employee benefit plan*, with respect to funds of the plan.[10]

The ANPR notes that individual retirement accounts (IRAs) are set up outside of a pension plan or employee benefit plan and thus are not expressly covered by these exceptions. We do not disagree. Then it states that "Certain non-retirement savings plans are also granted tax favored status under the Internal Revenue Code, such as 529 savings plans for higher education tuition and health savings accounts but are not expressly covered by the exception." Without addressing whether HSAs are employee benefit plans, the ANPR then describes the factors that the FDIC will consider in determining whether HSAs are brokered accounts under a separate statutory exemption for, "[a] trust department of an insured depository institution, if the trust in question has not been established for the primary purpose of placing funds with insured depository institutions."[11]

But the FDIC has already recognized that the vast majority of HSAs are employee benefit plans. In FDIC Advisory Opinion 05-06 (Nov. 28, 2005), FDIC staff considered whether an HSA established by an employer for employees would be insured as a revocable trust account or as an employee benefit plan account. The FDIC distinguished HSAs established by individuals from HSAs established by employers, noting that the "per beneficiary" coverage for revocable trust accounts would apply to an HSA established by an individual. The staff found, however, that an HSA established by an employer for employees would be insured not as a revocable trust account but as an employee benefit plan account. The latter type of account is not insured on a "per beneficiary" basis. Rather, an employee benefit plan account is insured up to $250,000 for the "non-contingent interest" of each plan participant (i.e., employee) provided that the insured depository institution satisfies capital requirements.[12]

HSAs can be distinguished from IRAs and Section 529 education savings plans. Those arrangements are established by individuals rather than employers, and are not typically made available even as voluntary benefits in the workplace. IRAs and Section 529 plans

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[10] Section 29(g)(2)(D) and (E) of the FDI Act (emphasis added).
[11] Section 29(g)(2)(C).
[12] See 12 C.F.R. § 330.14

may not be funded with pre-tax dollars through a cafeteria plan. Although an IRA may be funded with amounts rolled over from a qualified retirement plans, those distributions are not typically permitted until termination of employment.

HSAs, by contrast, may be established by employers for employees.[13] HSAs are "qualified benefits" which may be funded with pre-tax dollars through a cafeteria plan.[14] Employers that offer HSAs alongside HSA-qualified HDHPs are subject to extensive IRS rules and restrictions.[15] Though employees may select any HSA custodian, employers may limit contributions to the custodian selected by the employer.[16] As a result, most employees participate in the same arrangement through a custodian selected by the employer. Consistent with the FDIC's own guidance, HSAs established by employers are employee benefit plans for purposes of the Brokered Deposit rule.[17]

HCB does not offer retail HSAs in the individual market. HSAs custodied by HCB are established on behalf of employees by their employers.[18] HCB should be permitted to rely on the statutory exemption from the definition of a Deposit Broker for the trustee of an employee benefit plan.[19]

Similarly, all of HCB's HSA deposits are made through third party administrators (TPAs) that contract directly with employers for HSA administrative services. TPAs act as administrators of HSAs custodied at HCB and perform managerial functions with respect those accounts. Although "managerial functions" are not defined, TPAs handle all consumer contact, communication, and education on behalf of HCB. As described in HCB's HSA custodial agreement, TPAs are authorized and directed,

> (a) provide you with access to a personal HSA website account, (b) maintain electronic records showing the assets of your HSA and records of contributions, distributions, investment sweeps and any other related transactions, (c) process distribution requests from your HSA, (d) maintain all information necessary for us to prepare required returns, reports, or other documents for applicable taxing authorities, including IRS Forms 1099-SA and 5498-SA, and (g) provide related services.

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[13] DOL Field Assistance Bulleting ("FAB") 2006-2.
[14] Prop. Treas. Reg. 26 CFR 1.125-1(a)(3)(A).
[15] See, e.g., IRS Notices 2004-2, 2004-50 and 2008-59.
[16] DOL FAB 2006-02.
[17] Department of Labor (DOL) guidance correctly concludes that HSAs are not group health plans and therefore not an "employee welfare benefit plan subject to Title I of ERISA." DOL Field Assistance Bulleting ("FAB") 2004-1. But not every employee benefit plan is subject to ERISA. Examples of employee benefit plans that are not subject to ERISA include dependent care assistance programs under Section 129 of the Internal Revenue Code (the "Code"); adoption assistance programs under Section 137 of the Code; and educational assistance programs under Section 127 of the Code.
[18] Most HSA custodians have required this approach since at least 2006 when the DOL authorized employer-establishment of HSAs in FAB 2006-02. Too many employees otherwise fail to complete the necessary paperwork which precludes them from receiving employer contributions.
[19] Internal Revenue Code section 223(d)(1) defines an HSA as a trust account.

Accordingly, TPAs should be permitted to rely on the statutory exemption from the definition of Deposit Broker for "persons 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." (Emphasis added).

In summary, the FDIC's own guidance provides that HSAs established by employers are employee benefit plans. This interpretation is buoyed by the extensive regulatory scheme which contemplates that HSAs will be offered as a workplace benefit, and the fact that the vast majority of HSAs are established by employers. We request that the FDIC minimize confusion and concern in this area by recognizing in the proposed and final rule on brokered deposits that HSAs established by employers are employee benefit plans for purposes of the statutory exemptions to the definition of "Deposit Broker."

3. The "primary purpose" for establishing HSAs is not to place funds with insured depository institutions

We have requested that the FDIC recognize that HSAs established by employers are employee benefit plans for purposes of the statutory exemptions from the definition of "Deposit Broker." If the FDIC is unwilling to do so, we ask that the FDIC recognize that the exemption from the definition of Deposit Broker for trust departments be clarified to (1) provide that the primary purpose for establishing HSAs with a bank is to help employees meet deductibles and other out-of-pocket medical expenses under employer-sponsored HDHPs and not to place funds with insured depository institution, and/or (2) provide that the primary purpose of arrangements where HSA custodians compensate TPAs, investment advisors or other third parties that may place HSAs with the bank is to compensate these parties for significant ongoing services and not to place funds with insured depository institution.

Section 29(g)(2)(C) of the FDI Act includes the following exemption from the definition of Deposit Broker:

> A trust department of an insured depository institution, if the trust in question has not been established for the primary purpose of placing funds with insured depository institutions.

According to the ANPR,

> The primary purpose exception applies to ''an agent or nominee whose *primary purpose* is not the placement of funds with depository institutions.''[citation omitted] In particular, the primary purpose exception applies to a third party when that third party is acting as agent/nominee for the depositor. Staff's evaluation of a third party's primary purpose in placing deposits has been in the context of that particular agent/principal relationship.

> In interpreting what it means for a third-party agent to act pursuant to a ''primary purpose,'' staff has generally analyzed whether placing—or facilitating the placement—of deposits of its customers/clients when acting as agent for those customers/clients, is for a substantial purpose other than to provide (1) deposit insurance, or (2) a deposit-placement service.

a. The primary purpose of an agent or nominee for an HSA arrangement is to meet the trust requirements for HSAs in Section 223 of the Internal Revenue Code.

Facilitating the placement of HSAs with an HSA custodian is never for the primary purpose of obtaining deposit insurance or to provide a deposit-placement service. The primary purpose is to facilitate savings, through employer and employee contributions, to a trust that employees may use to pay out-of-pocket medical expenses. HSAs cannot be offered without a custodian that meets the requirements of Section 223(d)(1) of the Internal Revenue Code. Employers must select an HSA custodian first, above all other considerations, to facilitate contributions that will help employees pay medical expenses. The deposit placement activity is merely incidental to selecting an HSA custodian. Nothing in these arrangements smacks of the abuses or concerns sought to be rectified by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) or the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA).

b. HSA custodians do not compete on interest rates for employer-established HSAs

Deposit placement services traditionally seek the highest rates of interest in FDIC insured arrangements. FIRREA originally restricted troubled institutions from soliciting deposits by offering rates of interest on deposits that were significantly higher than the prevailing rates of interest on deposits in a bank's normal market area. These concerns are irrelevant to employer-established HSAs. Employers give much more weight to monthly maintenance fees, which are typically paid by the employer, and to factors such as data security, ease of administration, consumer support, and institutional experience. According to recent surveys, 64 to 66% of HSA accountholders are "spenders" rather than "savers."[20] Spenders are people who use their accounts to pay for health care expenses as they occur, and short term interest rates are unimportant to this group. In choosing HSA custodians, employers prefer custodians that offer decision-support tools, multiple reimbursement methods, minimum usage fees, and call center support services.

All large HSA custodians, including HCB, offer an array of mutual funds for self-directed investments. Employees who desire a higher rate of return have the opportunity

[20] Employee Benefit Research Institute. Trends in Health Savings Account Balances, Contributions, Distributions, and Investments, 2011-2017: Estimates From the EBRI HSA Database. https://www.ebri.org/publications/researchpublications/issue-briefs/content/trends-in-health-savings-account-balances-contributions-distributions-and-investments2011-2017-estimates-from-the-ebri-hsa-database. *And see* Devenir. HSA Investing: 3 Reasons Investing in an HSA is Not the Same as a 401(k) – Part 1. http://www.devenir.com/blog/hsa-investing-3-reasons-investing-hsa-not-401k-part-1/.

to invest their HSA in non-FDIC insured investments.[21] Although most HSA accountholders are "spenders," rather than "savers," the ability for savers to invest their HSA account balances in mutual funds eliminates the need to offer higher interest rates on cash balances.

c. Fees paid to TPAs, investment advisors and others that provide ongoing services to HSA arrangements are for managerial services, and not for brokered deposits.

The ANPR states that in determining whether a deposit- placement activity is incidental to some other purpose, staff reviews the reason or intent of the third party when acting as agent or nominee in placing the deposits, as well as other factors which might indicate whether the third party agent is incentivized to place deposits at the bank. These factors include the existence and structure of fee arrangements and of any programmatic relationship between the third party and the insured depository institution. As for fees, FDIC staff considers the following:

- Whether the entity placing deposits receives fees from the insured depository institution that are based (directly or indirectly) on the amount of deposits or the number of deposit accounts opened.

- Whether the fees can be justified as compensation for recordkeeping or other work performed by the third party for the IDI (as opposed to compensation for bringing deposits to the IDI).

HCB operates its HSA business through TPAs that perform significant, ongoing administrative services for HCB using a shared recordkeeping platform. It pays TPAs a small percentage (up to 100 bps) of daily average collected balances of HSA funds up to $2,000. Among other duties, the TPAs conduct consumer identification procedures for HCB, provide information necessary for the Bank to complete forms 5498-SA and 1099-SA, handle all consumer contact and communication, negotiate and enter into agreements with employers to make HSAs available, provide daily reconciliation of accounts, and transfer HSA contributions from employers to HCB. TPAs track contributions, distributions and balances at the individual HSA level. They settle debit card transactions; calculate interest earned on HSA balances; process charges for account fees; produce and distribute periodic account statements; maintain websites through which HSA accountholders can view their HSA balances and arrange transfers; and furnish daily and monthly reports to HCB; and produce and distribute annual tax forms to HSA accountholders. If it ever became necessary for the FDIC to pay insurance with respect to the HSAs, the TPA's records would determine the balance due to each accountholder.

These are not "referral fees" or "finder's fees" common to deposit brokers, and the amount of the fees are more than justified by the extensive services provided to HCB. Because the fees are ongoing, and do not decline over time, they promote long term relationships between HCB, TPAs and employers, improving the stability of the

[21] Employers may even select HSA providers that replicate their 401(k) lineups. *See* DOL FAB 2006-02.

accounts. Nor is tying compensation to account balances harmful to accountholders. As noted earlier, there are significant public policy reasons to promote savings by individuals in HSAs. By tying compensation to savings, TPAs have an incentive to educate and encourage more employees to become savers rather than spenders, and to encourage employers to contribute more towards individual accounts. Similar relationships across the industry with investment advisors and others promote stability, longevity, and growth in these critical savings vehicles. A third party that is paid merely by the number of accounts established looks more like a deposit broker, and will be much more likely to merely sign up employers and minimize its efforts to provide education and promote savings.

The ANPR goes on to suggest that, in determining whether a deposit- placement activity is incidental to some other purpose, it considers whether the relationship is "programmic." FDIC staff consider,

> Whether there is a formal or contractual agreement between IDIs and the placing/referring entity to place or steer deposits to certain IDIs.

It is unclear whether the FDIC prefers a programmic relationship to traditional "finders fees" which are much more likely to implicate the involvement of a deposit broker. HCB's arrangement with TPAs could not operate without clear and careful written agreements to allocate administrative duties between the parties. The agreements reflect that certain bank duties are delegated to the TPA, and this cannot occur without formal or contractual agreements. In this case, the existence of a written agreement is evidence that the deposit placement activity is incidental to the broader purpose of providing bank services to administer employee benefit plans.

We request that the proposed and final rule clarify that fees may be based on the amount of deposits when the entity placing deposits, pursuant to written agreements with a bank, performs traditional bank functions on behalf of an HSA custodian.

4. The nature of Brokered Deposits is completely different than the stable, low cost HSA deposits.

HCB's argument that HSAs are not brokered accounts is bolstered by the nature of the accounts themselves. In 1984, the FDIC and FHLBB issued a notice of proposed rulemaking on brokered deposits.[22] They expressed concerns with deposit-placement practices of simple brokering, CD participations, and deposit-listing services, noting as follows:

> The FDIC and the Board are concerned that the above-described deposit-placement practices enable virtually all institutions to attract large volumes of funds from outside their natural market area irrespective of the institutions' managerial and financial characteristics . . . The availability of these funds to all institutions, irrespective of financial and managerial soundness, reduces market

[22] See 48 Fed. Reg. 50339 (November 1, 1983).

> discipline. Although deposit brokering can provide a helpful source of liquidity to institutions, the practices described above make it possible for poorly-managed institutions to continue operating beyond the time at which natural market force would have otherwise.

For an HSA custodian to be successful, it must be able to offer a well-managed administrative platform that competes effectively on price and service with other HSA custodians across the country. The ability to attract HSA deposits correlates directly with the quality of service in a competitive market, not interest rates. This early effort at rulemaking pre-dated the internet, when the "natural market" was more closely correlated to geography; but HSA custodians like HCB use software-as-service platforms to provide high-level services to employers and their employees across the United States. The business is built on relationships and service; it is the level of sophistication and service that drives growth in these deposits, and the concern described above is not applicable to HSAs.

The Preamble to final rules issued in 1984 on brokered deposits also raised concerns about the nature of the deposits themselves:

> These funds, which are often received in large amounts at high cost, must be invested quickly for purposes of economic efficiency. The Agencies' experience has shown that the speed required may not allow for the usual care to be taken in appraisals and credit checks relative to investments. Moreover, the need to offer a high rate of return to attract brokered funds may require institutions to take greater investment risks, a factor often aggravated where the broker or associated parties suggest or stipulate particular uses for the funds.[23]

Contrary to the foregoing, HSAs are small accounts typically funded through payroll withholding. Interest rates are comparable to ordinary deposit accounts. HSA custodians compete for new business from employers that offer HSAs alongside high deductible health plans based on service. Employees who desire to obtain a higher return have the option to invest their account balances in mutual funds. In addition to service quality, the primary factor considered by employers is not interest rates paid on accounts but administrative fees.

The legislative history of section 29 of the FDA Act suggests that some members of Congress may have been concerned about deposit volatility. In a report produced by the House Committee on Banking, Finance and Urban Affairs in connection with FIRREA, this concern was expressed as follows:

> Many failed thrifts relied on volatile funding, such as brokered deposits controlled by a few individuals, which could be quickly withdrawn, paralyzing the institution. At one failed thrift, Jumbo Certificates of Deposit (usually deposits of $100,000 and over) made up 96 percent of total deposits. At another failed thrift, brokered deposits grew from 14% to 86% of all deposits in just one year. Because

[23] See 49 Fed. Reg. 13003, 13006 (April 2, 1984).

> these funds are generally more expensive to obtain they cut into the interest margin earned on investments. Lower net interest margins encourage managers to take greater risks in order to maintain adequate earnings. Higher risks are all too often translated into higher failures.

In the DSC Risk Management Manual of Examination Policies, the FDIC raises similar concerns:

> Customers who focus exclusively on yield are highly rate sensitive and can be a less stable source of funding than typical relationship deposit customers. These customers may have no other relationship with the bank and have no loyalty with their deposit funds. If more attractive returns become available, these customers may rapidly transfer funds to new institutions or investments in a manner similar to that of wholesale investors. Management should be aware of the number and magnitude of such deposits.

These concerns are completely irrelevant to HSA balances. HCB's experience has been that HSAs are relationship deposit customers, rather than customers who focus on yield. It works with thousands of employer groups, primarily small employers, through a network of third party administrators that have personal relationships with each decision-maker. Though a group may move in search of lower administrative fees, employers are not seeking higher rates, and HCB has no pressure to raise interest rates or take greater risks to maintain adequate earnings.

Though it is rare for an employer group to leave once their employees become accustomed to HCB's platform, the portfolio is so widely disbursed among employer groups that departures have little impact. HCB has experienced steady growth in these deposits since it first made them available in 2006. They have proven to be among the most stable accounts at the Bank.

Conclusion

The continued growth of HSAs, and the promotion of individual savings for health care expenses, is critical to ensure the financial stability, health and well-being of employees in an era of rising deductibles and out-of-pocket medical expenses. These are small, stable accounts built on relationships and service. Price competition among HSA custodians is not driven by interest rates on cash balances, but on account administrative service fees paid service platforms. Interest rates on cash balances are comparable to demand deposits within the HCB's market area, and are unimportant to consumers: most are spenders, not savers, and savers have the option of investing in mutual funds. HCB does not offer "retail" HSAs to walk-in customers. Decisions to choose HCB as an HSA custodian are made by employers. Due to the nature of these arrangements, experience has shown that HSA accounts made available through employers are highly stable and not at risk for movement due to higher interest rates offered by competing banks.

TPAs who enter into service agreements with HCB to perform traditional bank functions are in the business of employee benefits administration, and not in the business of placing deposits or facilitating deposits. In addition to HSAs, they typically administer health flexible spending accounts (health FSAs), health reimbursement arrangements (HRAs), cafeteria plans, and COBRA, among other services. They are "plan administrators" and should fall within the exemption under the definition of deposit brokers for plan administrators of employee benefit plans under 12 C.F.R. § 337.6(a)(5)(ii)(E).

The treatment of HSAs as "brokered deposits" does not advance any public policy aimed at reducing high risk or volatile deposits. To the contrary, it would have unintended consequences, making HSA arrangements more expensive and less competitive. The real risk is the rising cost of health care, reductions in employer coverage, and the lack of personal savings to pay for out-of-pocket medical expenses.

We request that the proposed and final rule clarify that employer-provided HSA arrangements are employee benefit plans for purposes of the statutory exemptions to the definition of deposit brokers, and we further request that the proposed and final rule permit payment to third parties based on account balances when the third parties remain actively engaged in providing administrative services to HSA arrangements.