America's Health Insurance Plans
601 Pennsylvania Avenue, NW
South Building, Suite Five Hundred
Washington, DC 20004

June 5, 2020

Mr. Robert E Feldman
Executive Secretary
Federal Deposit Insurance Corporation
Attention: Comments
550 17th Street NW
Washington, D.C. 20429

RE: **Unsafe and Unsound Banking Practices: Brokered Deposit Restrictions**
RIN 3064-AE94

Dear Mr. Feldman:

America's Health Insurance Plans (AHIP) appreciates the opportunity to provide comments on the FDIC's Notice of Proposed Rulemaking (NPRM) regarding brokered deposits. We ask that the FDIC clarify a previously unaddressed issue that will help protect the Health Savings Accounts (HSAs) on which millions of Americans depend for health and financial security as part of their employee benefit plans.

AHIP is the national association whose members provide coverage for health care and related services to millions of Americans every day. Our members also offer and administer HSAs, which continue to grow in utilization. Through these offerings, we improve and protect the health and financial security of consumers, families, businesses, communities and the nation. Americans deserve access to comprehensive, quality, affordable coverage. AHIP is committed to advancing policy solutions in support of this goal.

Our comments focus exclusively on the issue of whether trustees and custodians of HSAs are deposit brokers under the brokered deposit rules, codified at 12 CFR § 337.6. We respectfully urge the FDIC to finalize a rule that excludes HSAs from the definiton of a brokered deposit, establishing that HSAs and Treasury-certified trustees and custodians of those accounts are not subject to 12 CFR § 337.6. HSAs do not fall within the purpose or domain of this regulation, and trustees and custodians of these accounts should not be considered deposit brokers, for the following reasons:

1. HSAs qualify for the express exception in the regulation for employee benefit plans. While themselves financial accounts, HSAs may only be established as part of qualifying health insurance coverage, primarily as part of an employee benefit plan subject to Title I of ERISA.

2. HSAs are intentionally designed to be distinct from the "hot money" concerns that led to brokered deposit legislation and subsequent regulations. HSA funds are stable and statutorily restricted to use for very limited purposes – qualified medical expenses. As a result, unlike true brokered deposit accounts, these accounts do not raise the concerns about "hot money" that lead to the passage of the brokered deposit legislation.

Health Savings Accounts are tax-advantaged trust or custodial accounts that must coordinate with a high-deductible health plan, as defined by statute[1], and are limited in use for the reimbursement of Qualified Medical Expenses[2]. These accounts must be held by a trustee or custodian that is a licensed U.S. bank, life insurance company, or other organization approved by the U.S. Department of the Treasury. Regardless of the holder, the trustee or custodian's responsibilities are the same: a bona fide trust or custodial relationship whereby the trustee or custodian is obligated to follow the HSA holder's lawful instructions and ensure compliance with U.S. Treasury regulations.

A "brokered deposit" is any deposit accepted by an insured bank through a "deposit broker." Section 29 of the Federal Deposit Insurance Act (FDI Act) 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." However, Section 29(g)(2) establihses nine exclusions for qualifying as a deposit broker. Of those, two are directly related to 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. While the preamble to this NPRM notes these exceptions, the Proposed Rule is silent as to how these exclusions will be implemented under a final rule. We believe a custodian of a Health Savings Account qualifies under both exclusions and ask that a final rule expressly specify such.

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." Because non-bank trustees and custodians of HSAs deposit cash from HSAs with insured banks, these trustees and custodians could be confused with deposit brokers unless clarifying language is added to current regulations. Treating HSA trustees and custodians as deposit brokers would be in error and counter to the intent and purpose of Section 29 of the FDI Act. The, FDIC should use this rulemaking to confirm that HSAs are not brokered deposits.

HSAs qualify for the employee benefit plan exception. HSAs are an integral component of employer-sponsored consumer-directed health plans, and therefore should be treated as

[1] 26 U.S.C. § 223
[2] 26 U.S.C. § 213(d)

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, which is a type of employee benefit plan. Employers typically couple the high-deductible health plan with HSAs. Employers or their health insurers typically contract with an HSA provider 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.

HSA funds are not "hot money" and therefore distinct from the purpose of regulating brokered deposits. Brokered deposit regulation grew out of concerns about "hot money." HSAs do not implicate those concerns. 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.[3] 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.[4]

Concerns about "hot money" relate to a number of issues. As 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. These concerns are not triggered by HSAs, where deposit accounts are stable, often referred to as "sticky." They remain with the institution, rather than quickly transferred or traded. The very nature of HSAs makes them distinct from brokered deposits.

In summary, HSAs are an increasingly integral component of health plans, acting as valuable savings vehicles for millions of Americans. Congress created these to advance important public policies and allow for strong, stable savings to be used for health expenses, which is entirely distinct from the definition of a brokered deposit. 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

[3] "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).
[4] *See* H. Rep. No. 99-676, Federal Regulation of Brokered Deposits: A Follow-up Report, 99th Cong. 2d Sess. (1986).

broker. Accordingly, we recommend the FDIC should clarify that HSAs and non-bank trustees and custodians are not subject to the brokered deposit rule.

We thank the FDIC for your attention to this matter and consideration of our comments.

Sincerely,

[redacted]

Adam Beck
Vice President, Employer Health Policy & Initiatives
America's Health Insurance Plans