

December 28, 2023

The Honorable Lisa M. Gomez  
Assistant Secretary  
Employee Benefits Security Administration  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210

**Proposed Investment Advice Regulation and Proposed Amendment to  
Prohibited Transaction Exemption 2020-02**

Dear Assistant Secretary Gomez:

On behalf of the Employers Council on Flexible Compensation (“ECFC”), we are submitting this letter to comment on the proposed amendments to the Department of Labor’s investment advice regulation (the “Fiduciary Rule”) and the proposed amendment to Prohibited Transaction Exemption 2020-02 (the “Proposed Prohibited Transaction Amendment”). ECFC is grateful for the opportunity to comment on the Fiduciary Rule and the Proposed Prohibited Transaction Amendment.

ECFC is a membership association dedicated to preserving and expanding employer-provided tax-advantaged benefit choices for working Americans, including account-based plans which provide benefits in areas such as health care, childcare, and commuting. These benefits provide families with the support they need to meet their everyday living expenses and remain productive members of the workforce. ECFC’s members include employers and companies who provide administrative and consulting services to employer sponsors of employee benefit plans, including health savings accounts, health flexible spending arrangements, dependent care assistance flexible spending arrangements, health reimbursement arrangements, commuter and parking benefits, and COBRA continuation coverage. ECFC member companies assist in the administration of cafeteria plan and health benefits for over thirty-three million employees.

**The DOL’s Fiduciary Rule Incorrectly Draws in Health Savings Accounts**

The Fiduciary Rule proposal released by the Department on October 31, 2023, defined who is an investment advice fiduciary for purposes of the Employee Retirement Income Security Act (“ERISA”) expanding the previous rules on who was an investment advisory fiduciary. The Department also released proposed amendments to various prohibited transaction exemptions that are available to investment advice fiduciaries. The proposed Fiduciary Rule applied to financial services providers that provided investment advice to retirement accounts, including individual retirement accounts (“IRAs”). Of particular concern to members of ECFC was the

provision in the Fiduciary Rule proposal that stated that for purposes of the rule, health savings accounts (“HSAs”) would be considered IRAs.

ECFC members believe that the Department’s consideration of HSAs as IRAs is not well founded because HSAs, unlike IRAs, are more likely to be spending accounts rather than accounts used to save for retirement, such as IRAs and employer sponsored savings plans. Recent surveys found that only seven percent of HSA account holders invest the assets in their HSA.<sup>1</sup> Moreover, more than 70% of annual contributions to HSAs are withdrawn each year to pay for current expenses.<sup>2</sup> These numbers underscore the true function of these accounts as deposit-type accounts for current health expenses. In addition, unlike IRAs, HSAs are precluded from accepting significant rollovers from ERISA-covered retirement plans. Although HSA account owners may roll over funds from an IRA to an HSA, they can only do so once in their lifetime, and they can only do so if they are eligible to contribute to their HSA for the tax year. Further, the amount they roll over is limited to their HSA contribution limit for the tax year, which for 2023 is \$4,850 for singles (\$3,850 for individuals under age 55) and \$9,750 for married couples (\$7,750 if both spouses are under age 55). Industry experience is that even this limited rollover ability is rarely used. Therefore, to treat HSAs the same as IRAs under the Fiduciary Rule proposal is over-broad and we ask the Department to reconsider its position.

### **Impact of Fiduciary Rule on HSAs**

If the proposed Fiduciary Rule is not revised to provide that HSAs are not considered similarly to IRAs, providing investment advice to HSAs would now be covered by the Fiduciary Rule, ECFC members who administer HSAs may now be considered investment advice fiduciaries and will now need to rely on prohibited transaction exemptions of the Department to address any conflicts of interest with respect to advice.

Current prohibited transaction exemption 2020-02 allows investment advice fiduciaries to receive compensation for advice that would otherwise be prohibited if the fiduciary complies with the exemption’s conditions. The provisions of this exemption are limited to financial institutions, as defined in the exemption. In the Proposed Prohibited Transaction Exemption, the Department has asked for comments on whether the definition of financial institution is sufficiently broad to cover firms that render advice with respect to investments in HSAs. ECFC members request that the definition of financial institution under the Proposed Prohibited Transaction Exemption is expanded to include non-bank trustees that are approved by the Internal Revenue Service (“IRS”) to be a non-bank trustee or custodian for IRAs and HSAs.

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<sup>1</sup> [www.devenir.com/research/2022-year-end-devenir-hsa-research-report](http://www.devenir.com/research/2022-year-end-devenir-hsa-research-report)

<sup>2</sup> According to the Devenir Research report “2023 Midyear HSA Market Statistics and Trends, during the five years of 2018-2022, \$203.4 billion was contributed to HSAs and \$149.6 billion (73.5%) was withdrawn.

## IRS-Approved Non-Bank Trustees

Financial institutions, such as banks or insurance companies, are eligible to be a trustee or custodian of an IRA.<sup>3</sup> Such entities are also eligible to be a trustee of an HSA.<sup>4</sup> The IRS may allow another person to be a trustee or custodian of an IRA or HSA if that person demonstrates to the IRS that that person can meet the same standards as similar financial institutions for the administration of an IRA or HSA. These standards are set out in Treasury Regulation section 1.408-2(e). The person desiring to be a non-bank trustee must apply to the IRS to be approved and they are subject to regular IRS audits to ensure their compliance with these requirements. The IRS maintains a list of the entities that qualify to be a non-bank trustee or custodian.<sup>5</sup>

ECFC believes that the entities that qualify with the IRS as a non-bank trustee or custodian should also qualify for the provisions of the Proposed Prohibited Transaction Exemption as any other financial institution. These entities have provided services to HSA holders for the last twenty years and they should also be eligible under the Proposed Prohibited Transaction Exemption to receive compensation for the investment advice that they provide to HSA owners like the other financial institutions referenced in the Proposed Prohibited Transaction Exemption. If the Fiduciary Rule now provides that it applies to HSAs, the Proposed Prohibited Transaction Exemption should be expanded to include non-bank trustees or custodians.

Thank you for your consideration of our comments. If you have any questions or wish to discuss the content of this letter further, please do not hesitate to contact William Sweetnam (202-465-6397 or [wsweetnam@ecfc.org](mailto:wsweetnam@ecfc.org)).

Sincerely,

Christa M. Day  
Executive Director



William F. Sweetnam, Jr.  
Legislative and Technical Director



<sup>3</sup> Section 408(a)(2) of the Internal Revenue Code

<sup>4</sup> Section 223(d)(1)(B) of the Internal Revenue Code

<sup>5</sup> [www.irs.gov/pub/irs-tege/nonbank-trustee-list.pdf](http://www.irs.gov/pub/irs-tege/nonbank-trustee-list.pdf)