U.S. Department of Labor **Employee Benefits Security Administration**
Washington, D.C. 20210

FIELD ASSISTANCE BULLETIN NO. 2004-01

DATE: APRIL 7, 2004

MEMORANDUM FOR: VIRGINIA C. SMITH, DIRECTOR OF ENFORCEMENT
REGIONAL DIRECTORS

FROM: ROBERT J. DOYLE
DIRECTOR OF REGULATIONS AND INTERPRETATIONS

SUBJECT: HEALTH SAVINGS ACCOUNTS

ISSUE:

Whether Health Savings Accounts established in connection with employment-based group health plans constitute "employee welfare benefit plans" for purposes of Title I of ERISA?

BACKGROUND:

Section 3(1) of the Employee Retirement Income Security Act of 1974 (ERISA) defines the term "employee welfare benefit plan" in relevant part to mean "any plan, fund, or program . . . established or maintained by an employer . . . to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness . . . ."

Section 1201 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173 (the Medicare Modernization Act), added section 223 to the Internal Revenue Code (Code) to permit eligible individuals to establish Health Savings Accounts (HSAs).[1] In general, HSAs are established to receive tax-favored contributions by or on behalf of eligible individuals, and amounts in an HSA may be accumulated over the years or distributed on a tax-free basis to pay or reimburse "qualified medical

[1] The U.S. Department of the Treasury and the Internal Revenue Service (IRS), which have interpretive and regulatory authority over HSAs under section 223 of the Code, issued general guidance concerning HSAs on December 22, 2003, in I.R.S. Notice 2004-2, and issued additional guidance on March 30, 2004, in I.R.S. Notice 2004-23, I.R.S. Notice 2004-25, Revenue Ruling 2004-38, and Revenue Procedure 2004-22. The Treasury/IRS guidance is available on the Internet at www.treas.gov/offices/public-affairs/hsa.

expenses." In order to establish an HSA, an eligible individual, among other conditions, must be covered under a High Deductible Health Plan (HDHP).[2] Contributions to an HSA established by an eligible individual who is an employee may be made by the employee, the employee's employer or both in a given year.[3] Amounts in an HSA may be rolled over to another HSA.[4] If an employer makes contributions to HSAs, the employer must make available a comparable contribution on behalf of all eligible employees with comparable coverage during the same period.[5] However, employers that make contributions to an employee's HSA are not responsible for determining whether HSAs are used for qualified medical expenses or for investing or managing amounts contributed to an employee's HSA.[6]

It is our understanding that a number of employers that currently sponsor ERISA-covered group health plans may wish to add an HDHP option and offer programs designed to enable employees to establish HSAs to pay for medical expenses not covered by the HDHP. Questions have been raised about whether, and under what circumstances, HSAs established in connection with employment-based programs would constitute "employee welfare benefit plans" within the meaning of section 3(1) of ERISA.

ANALYSIS:

Congress, in enacting the Medicare Modernization Act, recognized that HSAs would be established in conjunction with employment-based health plans and specifically provided for employer contributions. However, neither the Medicare Modernization Act nor section 223 of the Code specifically address the application of Title I of ERISA to HSAs. Based on our review of Title I, and taking into account the provisions of the Code as amended by the Medicare Modernization Act, we believe that HSAs generally will not constitute employee welfare benefit plans established or maintained by an employer where employer involvement with the HSA is limited, whether or not the employee's HDHP is sponsored by an employer or obtained as individual coverage.

Specifically, HSAs meeting the conditions of the safe harbor for group or group-type insurance programs at 29 C.F.R. § 2510.3-1(j)(1)-(4) would not be employee welfare benefit plans within the meaning of section 3(1) of ERISA.[7] Moreover, although

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[2] See I.R.S. Notice 2004-2, Q&A Nos. 1 and 2.
[3] Id. Q&A No. 11.
[4] Id. Q&A No. 23.
[5] Id. Q&A No. 32.
[6] Id. Q&A No. 30.
[7] Regulation section 2510.3-1(j) excludes from Title I coverage certain group or group-type insurance programs. In general, such programs are excluded from coverage where there are no employer contributions, employee participation is voluntary, the employer does not endorse the program, and the employer receives no consideration in connection with the program, other than reasonable compensation for administrative services actually rendered in connection with payroll deductions. S*ee also* 29 C.F.R. § 2509.99-1 relating to payroll deduction IRAs.

contributions or payment of group insurance premiums by an employer would be a significant consideration in determining whether a group or group-type insurance arrangement is an employee welfare benefit plan under section 3(1), such contributions or payments are not necessarily significant in analyzing the status of HSAs under ERISA. As noted above, HSAs are personal health care savings vehicles rather than a form of group health insurance. For example, funds deposited in an HSA generally may not be used to pay health insurance premiums,[8] and the beneficiaries of the account have sole control and are exclusively responsible for expending the funds in compliance with the requirements of the Code. Because of these differences, we regard court precedent on the significance of employer contributions to group or group-type insurance arrangements as inapposite to HSAs. In the group health insurance context, the employer, whether by choosing an insurance policy or creating a self-funded program, typically establishes the type of benefits provided, the conditions for their receipt, and the manner in which claims will be adjudicated. In the context of HSAs, however, the employer may be doing little more than contributing funds to an account controlled solely by the employee.

Accordingly, we would not find that employer contributions to HSAs give rise to an ERISA-covered plan where the establishment of the HSAs is completely voluntary on the part of the employees and the employer does not: (i) limit the ability of eligible individuals to move their funds to another HSA beyond restrictions imposed by the Code; (ii) impose conditions on utilization of HSA funds beyond those permitted under the Code; (iii) make or influence the investment decisions with respect to funds contributed to an HSA; (iv) represent that the HSAs are an employee welfare benefit plan established or maintained by the employer; or (v) receive any payment or compensation in connection with an HSA.

The mere fact that an employer imposes terms and conditions on contributions that would be required to satisfy tax requirements under the Code or limits the forwarding of contributions through its payroll system to a single HSA provider (or permits only a limited number of HSA providers to advertise or market their HSA products in the workplace) would not affect the above conclusions regarding HSAs funded with employer or employee contributions, unless the employer or the HSA provider restricts the ability of the employee to move funds to another HSA beyond those restrictions imposed by the Code.

CONCLUSION:

HSAs generally will not constitute "employee welfare benefit plans" for purposes of the provisions of Title I of ERISA. Employer contributions to the HSA of an eligible

[8] Although the Medicare Modernization Act excludes health insurance from the qualified medical expenses that may be paid from an HSA, there are exceptions for the payment of COBRA premiums, certain insurance for individuals over 65, long-term care insurance premiums and health insurance during periods of unemployment. Code section 223(d)(2).

individual will not result in Title I coverage where, as discussed above, employer involvement with the HSA is limited. Finding that an HSA established by an employee is not covered by ERISA does not, however, affect whether an HDHP sponsored by the employer is itself a group health plan subject to Title I. In fact, unless otherwise exempt from Title I (e.g., governmental plans, church plans) employer-sponsored HDHPs will be employee welfare benefit plans within the meaning of ERISA section 3(1) subject to Title I.

Questions concerning this matter may be directed to Suzanne Adelman, Division of Coverage, Reporting and Disclosure at 202-693-8523.