



FIELD ASSISTANCE BULLETIN NO. 2006-02

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

FROM: ROBERT J. DOYLE
DIRECTOR OF REGULATIONS AND INTERPRETATIONS

SUBJECT: HEALTH SAVINGS ACCOUNTS – ERISA Qs & As

BACKGROUND:

In general, a Health Savings Account (HSA) is an account established pursuant to section 223 of the Internal Revenue Code (Code) to pay or reimburse the qualified medical expenses of eligible individuals. Although the requirements for tax qualified HSAs are found in the Code, questions regarding the application of the Employee Retirement Income Security Act of 1974 (ERISA) to HSAs arise because employers may establish and contribute to an employee's HSA. On April 7, 2004, the Department of Labor's Employee Benefits Security Administration issued Field Assistance Bulletin (FAB) 2004-01 addressing the status of HSAs under ERISA. That guidance explained that HSAs generally will not constitute "employee welfare benefit plans" covered by Title I of ERISA where employer involvement with the HSA is limited.

In FAB 2004-01, the Department specifically indicated that employer contributions to HSAs would not give rise to an ERISA-covered plan where the establishment of the HSA is completely voluntary on the part of the employees and the employer does not: limit the ability of eligible individuals to move their funds to another HSA or impose conditions on utilization of HSA funds beyond those permitted under the Code; make or influence the investment decisions with respect to funds contributed to an HSA; represent that the HSA is an employee welfare benefit plan established or maintained by the employer; or receive any payment or compensation in connection with an HSA.

Since the issuance of FAB 2004-01, the Department has received a number of recurring questions about the guidance and the evolving practices regarding the offering of HSAs.

The following provides further guidance on many of the frequently asked questions raised with the Department.

QUESTIONS AND ANSWERS:

Q-1. In the absence of an employee’s affirmative consent, may an employer open an HSA for an employee and deposit employer funds into the HSA without violating the condition in the FAB that requires that the establishment of an HSA by an employee be “completely voluntary”?

A-1. Yes. The intended purpose of the “completely voluntary” condition in FAB 2004-01 is to ensure that any contributions an employee makes to an HSA, including salary reduction amounts, will be voluntary. HSA accountholders have sole control and are exclusively responsible for expending HSA funds and generally may move the funds to another HSA or otherwise withdraw the funds. The fact that an employer unilaterally opens an HSA for an employee and deposits employer funds into the HSA does not divest the HSA accountholder of this control and responsibility and, therefore, would not give rise to an ERISA-covered plan so long as the conditions described in FAB 2004-01 are met.

Q-2. If an employer maintains a high deductible health plan (HDHP) for its employees, can the employer limit the HSA providers that it allows to market their HSA products in the workplace or select a single HSA provider to which it will forward contributions without making the HSA part of the employer’s ERISA-covered group health plan?

A-2. Yes. As stated in FAB 2004-01, an employer may offer an HSA to its employees without establishing an ERISA-covered plan in one of two ways. The employer may rely on the group-type insurance safe harbor in 29 C.F.R. § 2510.3-1(j), in which case the employer cannot make contributions to the HSA, or it may rely on the separate conditions outlined in FAB 2004-01, in which case the employer may or may not elect to make employer contributions to the HSA.

If the employer relies on the group-type insurance safe harbor in 29 C.F.R. § 2510.3-1(j), it cannot “endorse” the HSA provider. In the Department’s view, an employer would not be considered to “endorse” an HSA within the meaning of the regulation merely by limiting the HSA providers that it allows to market their HSA products in the workplace or selecting a single HSA provider to which it will forward contributions. Employers may also provide employees general information on the advisability of using an HSA in conjunction with the HDHP without “endorsing” the program. *See generally* Interpretive Bulletin 99-1, 29 C.F.R. § 2509.99-1.

The separate conditions in FAB 2004-01, though including completely voluntary employee participation and employer neutrality in not representing that the HSA is an employee welfare benefit plan established or maintained by the employer, do not include the group-type insurance safe harbor's prohibition on employer "endorsement." As explained in FAB 2004-01, an employer could limit the HSA providers that it allows to market their HSA products in the workplace or select a single HSA provider to which it will forward contributions and still satisfy the conditions outlined in the FAB without converting the HSA into an ERISA-covered plan.

Q-3. Would an employer be viewed as "making or influencing" the HSA investment decisions of employees, within the meaning of the FAB, merely because the employer selects an HSA provider that offers some or all of the investment options made available to the employees in their 401(k) plan?

A-3. No. The mere fact that an employer selects an HSA provider to which it will forward contributions that offers a limited selection of investment options or investment options that replicate the investment options available to employees under their 401(k) plan would not, in the view of the Department, constitute the making or influencing of an employee's investment decisions giving rise to an ERISA-covered plan, so long as employees are afforded a reasonable choice of investment options and employees are not limited in moving their funds to another HSA. The selection of a single HSA provider that offers a single investment option would not, in the view the Department, afford employees a reasonable choice of investment options.

Q-4. If contributions to an HSA are made through a cafeteria plan, would the savings that benefit the employer from non-payment of FICA and FUTA taxes on those contributions be considered "payment or compensation received in connection with an HSA" that would subject the HSA to Title I coverage?

A-4. No. The Department does not view an employer's non-payment of FICA and FUTA taxes on amounts contributed to an HSA as "payment or compensation" for purposes of the guidance issued in FAB 2004-01.

Q-5. Can an employer pay the fees associated with the HSA that the employee would normally be expected or required to pay without causing the HSA to become an ERISA-covered plan?

A-5. Yes. As stated in the FAB, the mere fact that an employer contributes to an HSA does not result in the HSA being an ERISA-covered plan. Therefore, the Department does not believe that an employer paying fees associated with an HSA that the employee would otherwise be required to pay would make that HSA an ERISA-covered plan.

Q-6. May an HSA vendor offer an HSA product it offers to the public to its own employees without the HSAs being considered employee benefit plans covered by ERISA?

A-6. Yes. Offering HSA products that the employer offers to the public in the regular course of business would not mean the HSA provider established or is maintaining the HSA as an employer to provide benefits to its employees.

Q-7. If the employer limits the number of HSA vendors to which it will forward contributions, may the employer receive a discount on another product from one of the selected HSA vendors?

A-7. No. In the Department's view, receiving a discount on another product from an HSA vendor selected by the employer would constitute the employer receiving a "payment" or "compensation" in connection with an HSA. In the Department's view, the arrangement would also give rise to fiduciary and prohibited transaction issues.

Q-8. Are HSAs subject to the prohibited transaction provisions of section 4975 of the Internal Revenue Code?

A-8. Yes. Although the Department believes that HSAs meeting the conditions of FAB 2004-01 generally will not be ERISA-covered plans, the Medicare Modernization Act specifically provided that HSAs will be subject to the prohibited transaction provisions in section 4975 of the Code. In that regard, the Department's plan asset regulation at 29 C.F.R. § 2510.3-102 states, in relevant part, that "[f]or purposes of [certain specified provisions of ERISA] and section 4975 of the Internal Revenue Code only . . . the assets of the plan include amounts . . . that a participant or beneficiary pays to an employer, or amounts that a participant has withheld from his wages by an employer, for contribution to the plan as of the earliest date on which such contributions can reasonably be segregated from the employer's general assets." (Emphasis added). As a result, employers who fail to transmit promptly participants' HSA contributions may violate the prohibited transaction provisions of section 4975 of the Code. *See* Code § 4975(c)(1)(D) (prohibited transactions include the "transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a plan").

Q-9. Do the class prohibited transaction exemptions for owners of individual retirement accounts (IRAs) apply to accountholders of HSAs?

A-9. No. The class exemptions issued by the Department for products and services offered owners of IRAs, PTE 97-11, PTE 93-33, PTE 93-1, do not apply to HSA accountholders.

Q-10. Is it a prohibited transaction for an HSA provider to offer a cash incentive for establishing an HSA with that provider?

A-10. No, if the provider deposits the incentive into the HSA. The Department stated in Advisory Opinion 2004-09A that, in certain situations, an HSA provider would not violate the prohibited transaction provisions under Code section 4975(c) or ERISA section 406 where the HSA provider offers an incentive to individuals for establishing an HSA with that provider by depositing cash directly into the individual's HSA. A cash contribution to an HSA generally would not be considered a "sale or exchange of property" or "a transfer of plan assets" for purposes of the prohibited transaction provisions of the Code. Because the cash contribution goes to the HSA and not the HSA account holder, the HSA's receipt of the cash contribution also would not be considered an act of self dealing on the part of the HSA account holder nor a receipt by the HSA account holder in his or her individual capacity of any consideration from a party dealing with the HSA.

Q-11. May an HSA vendor provide a line of credit for HSA expenses to an HSA accountholder choosing its HSA?

A-11. The Internal Revenue Service has issued guidance permitting eligible individuals to use debit, credit, or stored-value cards to receive distributions from an HSA for qualified medical expenses. *See* IRS Notice 2004-2, Q&A 37. Subsequent guidance by the Service explains that, under section 223(e)(2) of the Code, account beneficiaries, HSA trustees, and HSA custodians may not enter into certain "prohibited transactions" with an HSA. *See* IRS Notice 2004-50, Q&A 67, 68. For example, an account beneficiary may not borrow or pledge the assets of the HSA or receive a benefit in his or her own individual capacity as a result of opening or maintaining an HSA because such a transaction would constitute a prohibited transfer to or use of the HSA assets by or for the benefit of the account beneficiary. *See* Advisory Opinion 89-12A. Whether a credit card arrangement between a vendor and owner of an HSA results in a prohibited transaction would depend on specific facts and circumstances. A prohibited transaction would not result merely from an HSA accountholder directing the payment of HSA funds to the credit line vendor to reimburse the vendor for HSA expenses paid with a credit card.